

UNITED STATES DEPARTMENT OF AGRICULTURE

AGRICULTURE DECISIONS

DECISIONS OF THE SECRETARY OF AGRICULTURE

ISSUED UNDER THE

REGULATORY LAWS ADMINISTERED BY THE

UNITED STATES DEPARTMENT OF AGRICULTURE

(Including Court Decisions)



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PREFATORY NOTE

It is the purpose of this official publication to make available to the public, in an orderly and accessible form, decisions issued under regulatory laws administered by the Department of Agriculture.

The decisions published herein may be described generally as decisions which are made in proceedings of a quasi-judicial character, and which, under the applicable statutes, can be made by the Secretary of Agriculture, or an officer authorized by law to act in his stead, only after notice and hearing or opportunity for a hearing. These decisions do not include rules and regulations of general applicability which are required to be published in the Federal Register.

The principal statutes concerned are the Agricultural Marketing Act of 1946 (7 U.S.C. 1621 *et seq.*), the Agricultural Marketing Agreement Act of 1937 (7 U.S.C. 601 *et seq.*), the Animal Quarantine and Related Laws (21 U.S.C. 111 *et seq.*), the Animal Welfare Act (7 U.S.C. 2131 *et seq.*), the Federal Meat Inspection Act (21 U.S.C. 601 *et seq.*), the Grain Standards Act (7 U.S.C. 1821 *et seq.*), the Horse Protection Act (15 U.S.C. 1821 *et seq.*), the Packers and Stockyards Act, 1921 (7 U.S.C. 181 *et seq.*), the Perishable Agricultural Commodities Act, 1930 (7 U.S.C. 499a *et seq.*), the Plant Quarantine Act (7 U.S.C. 151 *et seq.*), the Poultry Products Inspection Act (21 U.S.C. 451 *et seq.*), and the Virus-Serum-Toxin Act of 1913 (21 U.S.C. 151-158).

The decisions published herein are arranged alphabetically by statute and within the statute section by date of issue or date decision became final after expiration of the appeal period. A decision may be cited by giving the volume and page, for illustration, 1472 (1942). It is unnecessary to cite the docket or decision number. Prior to 1942 the Secretary's decisions were identified by docket and decision numbers, for example, D-578; S. 1150. Such citation of a case in these volumes generally indicates that the decision is not published in Agriculture Decisions.

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*In re: C.L. MORGAN d/b/a/ CLEVELAND LIVESTOCK MARKET. A.Q.
Docket No. 228. Decided March 7, 1986.*

Edward H. McGrail, Administrative Law Judge.

Joseph Pembroke, for complainant.

For respondent, pro se.

CONSENT DECISION

This proceeding was instituted under the Act of February 2, 1903, as amended, (Act) (21 U.S.C. §§ 111, 120, and 122) by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service alleging that C.L. Morgan d/b/a Cleveland Livestock Market, respondent violated the Act and regulations promulgated thereunder (9 CFR § 78.1 *et seq.*) and (9 CFR 85.7 *et seq.*). The parties have agreed that this proceeding should be terminated by the Consent Decision set forth below and have agreed to the following stipulations:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, respondent specifically admits that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining allegations in the complaint, admits to the Findings of Fact set forth below, and waives:

(a) any further procedure;

(b) any requirements that the final decision in this proceeding contain findings and conclusions with respect to all material facts of fact, law or discretion, as well as the reasons or bases therefor;

(c) all rights to seek judicial review and otherwise challenge the validity of this decision; and

Respondent also stipulates and agrees that the United States Department of Agriculture is the "prevailing party" in the proceeding and waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by the respondent in connection with this proceeding.

FINDINGS OF FACT

1. Morgan, is an individual doing business as Cleveland Livestock Market whose mailing address is P.O. Box 488, Cleveland,

about February 26, 1985, respondent shipped swine and a cow from Miller Livestock Market, DeRidder, Louisiana, and, Texas.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and having agreed to the provisions set forth in the following order in disposition of the proceeding, such order and decision will be issued.

ORDER

The respondent is assessed a civil penalty of five hundred dollars (\$500) which shall be paid in five equal monthly installment of one hundred dollars each. Payment shall be to the "Treasurer of the United States" by certified check or money order, and shall be forwarded to Joseph P. Pembroke, Office of the General Counsel, Room 2422, South Building, United States Department of Agriculture, Washington, D. C. 20250-1400, within thirty (30) days from the effective date of this order.

This order shall become effective on the day this order is served upon the respondent.

In re: OLE SKAARUP d/b/a SKAARSHIP FARMS. A.Q. Docket No. 230.
Decided March 7, 1986.

Victor W. Palmer, Administrative Law Judge.
Jaru Ruley, for complainant.
For respondent, *pro se*.

CONSENT DECISION

This proceeding was instituted under the Act of February 2, 1903, as amended, (Act) (21 U.S.C. §§ 111 and 120) by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service alleging that the respondent violated the Act and regulations promulgated thereunder (9 CFR § 78.1 *et seq.*). The parties have agreed that this proceeding should be terminated by entry of the Consent Decision set forth below and have agreed to the following stipulations:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, the respondent specifically admits that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining allegations in the complaint, admits to the Findings of Fact set forth below, and waives:

(a) any further procedure;

(b) any requirements that the final decision in this proceeding contain findings and conclusions with respect to all material

issues of fact, law or discretion, as well as the reasons or bases thereof;

(c) all rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. Respondent also waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by the respondent in connection with this proceeding.

FINDINGS OF FACT

1. Ole Skaarup d/b/a Skarship Farms, respondent, is an individual whose mailing address is Skarship Farms, c/o Skaarup Shipping Corporation, 66 Field Point Road, Greenwich, Connecticut 06830.

2. On or about September 12, 1984, the respondent moved a brucellosis-exposed cow interstate from Hillsdale, New York, to Quirk Land and Cattle Company, Hastings, Nebraska.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and having agreed to the provisions set forth in the following Order in disposition of this proceeding, such order and decision will be issued.

ORDER

The respondent is assessed a civil penalty of four hundred fifty dollars (\$450.00). The respondent shall make payment by sending a certified check or money order payable to the "Treasurer of the United States," to Jaru Ruley, Office of the General Counsel, Room 2422, South Building, United States Department of Agriculture, Washington, D. C. 20250-1400, not later than thirty (30) days from the effective date of this order.

This order shall become effective on the day upon which service of this order is made upon respondent.

In re: RALPH MOONEY. A.Q. Docket No. 139. Decided March 12, 1986.

Three violations brucellosis eradication program—Interstate cattle movement without documentation—civil penalty.

The Judicial Officer affirmed Judge McGrail's order assessing civil penalties totaling \$3,000 for violations of the Brucellosis Eradication Program involving the transportation of cattle interstate that were not accompanied by the required owner's

statement or other document, that were not accompanied by a health certificate and a permit for entry, and brucellosis reactors were not moved directly to a recognized slaughtering establishment. Complainant need only prevail by a preponderance of the evidence. Respondent's actions in connection with four cattle involved three separate violations and, therefore, a \$3,000 civil penalty may be assessed. Severe sanction policy explained. Violations of the Brucellosis Eradication Program are very serious violations.

Donald A. Campbell, Judicial Officer

Kris Ikejiri, for complainant

Kenneth M. Burns, Okolona, Mississippi, for respondent

DECISION AND ORDER

This is an administrative proceeding for the assessment of civil penalties for violations of the regulations governing the interstate movement of cattle to prevent the spread of brucellosis (9 CFR §§ 71.18, 78.7, 78.9(c)). An initial Decision and Order was issued on December 16, 1985, by Administrative Law Judge Edward H. McGrail (ALJ) assessing civil penalties totalling \$3,000.

On January 22, 1986, respondent appealed to the Judicial Officer, to whom final administrative authority to decide the Department's cases subject to 5 U.S.C. §§ 556 and 557 has been delegated (7 CFR § 2.25).^{*} The case was referred to the Judicial Officer for decision on February 25, 1986.

Based upon a careful consideration of the record, the initial Decision and Order is adopted as the final Decision and Order in this case (with a few changes too trivial to be itemized). Additional conclusions by the Judicial Officer follow the ALJ's conclusions.

ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION

PRELIMINARY STATEMENT

This is an administrative proceeding for the assessment of civil penalties against Ralph Mooney, respondent herein, for violations of the Act of February 2, 1903, as amended (21 U.S.C. § 111 and § 120), and regulations promulgated thereunder (9 CFR § 71.1 *et seq.* and § 78.1 *et seq.*), in accordance with the Rules of Practice in 9 CFR § 70.1 *et seq.* and 7 CFR 1.130 *et seq.* This proceeding was instituted by a complaint filed on December 20, 1984, by the Adminis-

^{*} The position of Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C. §§ 450c-450g), and Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219 (1953), reprinted in 5 U.S.C. app. at 1068 (1982). The Department's present Judicial Officer was appointed in January 1971, having been involved with the Department's regulatory programs since 1949 (including 3 years' trial litigation; 10 years' appellate litigation relating to appeals from the decisions of the prior Judicial Officer; and 8 years as administrator of the Packers and Stockyards Act regulatory program).

trator of the Animal and Plant Health Inspection Service (APHIS), United States Department of Agriculture. Respondent filed an answer on February 19, 1985, *pro se*. Respondent's Motion to Amend Answer was granted by Order dated June 5, 1985, and such amended answer was filed on June 17, 1985. A full evidentiary hearing on the record was held before the undersigned on June 26, 1985, in Oxford, Mississippi. Complainant was represented by Kris H. Ikejiri, Esq., Office of General Counsel, U.S. Department of Agriculture, Washington, D. C. Respondent was represented by Kenneth M. Burns, Esq., Okolona, Mississippi. The parties were given leave to file simultaneous post hearing briefs by August 16, 1985, and such brief have been filed by both parties.

ISSUES PRESENTED

I

Whether the respondent on March 13, 1984, moved interstate from Memphis, Tennessee to Pontotoc, Mississippi, approximately four (4) cattle in violation of section 71.18 of the regulations because the cattle were not accompanied by an owner's statement or other document.

II

Whether the respondent on March 13, 1984, moved interstate from Memphis, Tennessee to Pontotoc, Mississippi, approximately two (2) cattle in violation of section 78.7 of the regulations because the cattle were brucellosis reactors and were not moved for immediate slaughter directly to a recognized slaughtering establishment.

III

Whether the respondent on or about March 13, 1984, moved interstate from Memphis, Tennessee to Pontotoc, Mississippi, approximately two (2) cattle in violation of section 78.9(c) of the regulations because the cattle were not accompanied by a health certificate and a "Permit for Entry", as required.

STATEMENT OF LAW AND REGULATIONS

Generally, Sections 111 and 120 of Title 21, of the United States Code, authorize the Secretary of Agriculture to promulgate such regulations as to prevent the introduction, dissemination, or spread of contagious animal diseases through interstate movements of cattle. Section 122 of Title 21, of the United States Code, provides for the assessment of not more than one thousand dollars for each violation of the regulations issued by the Secretary of Agriculture

pursuant to the authority invested in him in Sections 111 and 120 of Title 21, United States Code.

Section 71.18 of the Regulations (9 CFR § 71.18) promulgated by the Secretary of Agriculture pursuant to the above authority requires, as pertinent here, that cattle two (2) years of age, or over, and moved interstate other than directly to slaughter or to a quarantined feed lot must be accompanied by an owner's statement, or other document, showing the point of origin, the destination, the number of animals covered by the statement, the name and address of the owner or shipper, and the identifying numbers of the backtags or other approved identification applied.

Section 78.7 of the Regulations (9 CFR § 78.7) provides that brucellosis reactor cattle may only be moved interstate for immediate slaughter directly to a recognized slaughtering establishment if they are identified by a "B" brand on the left jaw and a metal tag on the left ear with a serial number and indication the animals are brucellosis reactors; and accompanied by a permit to be delivered to the consignee. A "Permit", VS Form 1-27, is required to accompany an interstate movement of "B" branded cattle (78.1(o)(1)).

Section 78.9(c) of the Regulations (9 CFR 78.9(c)) provides that cattle originating in a Class B State that are non-vaccinates under 18 months of age, or are official calfhood vaccinates of the beef breeds under 24 months of age, or are official calfhood vaccinates of the dairy breeds under 20 months of age, unless they are parturient or postparturient, may be moved interstate without being tested for brucellosis. If over these ages, or if they are parturient or postparturient and under these ages, they may be moved interstate when accompanied by a health certificate and "Permit for Entry." A "Permit for Entry" is a premovement authorization, oral or written, for entry into the State of destination (9 CFR § 78.1(o)(2)).

DISCUSSION AND CONCLUSIONS

As noted from the Issues, *supra*, the allegations charged evolve from respondent's purchase of four (4) cows at the South Memphis Stockyards Co., Memphis, Tennessee, on March 13, 1984, and their interstate movement on that same date, culminating in three separate charges of violations of Title 9, Code of Federal Regulations, §§ 71.18, 78.7 and 78.9(c).

Dr. A. H. Ward is a Veterinary Medical Officer, Animal and Plant Health Inspection Service, U.S. Department of Agriculture (APHIS-USDA). He supervises various veterinary services in an eleven county area in north-central Mississippi, including the Federal/State brucellosis control and eradication program. He described brucellosis as a highly infectious, contagious communicative

disease of livestock which can also infect humans. In livestock it is considered a reproductive disease which causes abortion, weak or stillborn calves, decreased milk production and death of mature animals. In humans, it can cause undulant fever. States are classified by regulation as to the degree of prevalence of the disease in a particular state, i.e., "Free", "C". The lower the letter of the alphabet, the more prevalent the degree of existence of brucellosis in that state; i.e., a "B" State has more brucellosis than an "A" State. Tennessee is classified as a Class B State (9 CFR 78.20(c)).

He further testified that interstate movement of cattle is governed by regulations which are aimed at the prevention of the disease and control of infected animals. Such brucella-infected animals are referred to as "reactors" and are required to have a red tag in the left ear and to be branded with a "B" on the hip. Once such animals are loaded on a truck for interstate shipment they must not be unloaded until they reach their destination or a slaughtering plant. Other controls promulgated in the regulations for the interstate shipment of cattle include an owner's Health Certificate, Permits for Entry, ear tags and branding marks. These make up an identification system whereby individual animals moving interstate may, among other things, be traced to their origin, as well as their destination (Tr. 12-18).¹

Dr. Ward has spoken to Mr. Mooney on several occasions regarding these regulations. He cited a letter, dated June 1, 1983, from the Senior Staff Veterinarian, Veterinary Services, USDA, to Mr. Mooney cautioning him that he had not followed the regulations in shipping cattle on March 31, 1983, from South Memphis Stockyards, Memphis, Tennessee (South Memphis Stockyard at Pontotoc, Mississippi, because they were not licensed by the required Health Certificate or Permit for Entry. Dr. Ward provided a copy of the regulations and offered to be of assistance to him in the interstate movement of cattle. Dr. Ward testified that the Pontotoc Stockyard, operated by Mr. Mooney, is not an official quarantined feedlot. To his knowledge, the most common method of movement to unload animals for watering is when animals are shipped over long distances by railroad. He would consider the movement of brucellosis reactor animals on to another conveyance as a mechanical difficulty with the original truck to be a minor

¹ Reference to exhibits are designated "CX" and "RX" to indicate those testified by complainant and respondent, respectively. References to the hearing transcript are designated "Tr.".

circumstance to the requirement that such animals be taken directly to a slaughtering establishment (CX-1; Tr. 16, 19-21, 103-106).

Mr. Olin A. Valentine, Compliance Officer, APHIS-USDA, Jackson, Mississippi, testified that while on official business at the Pontotoc Stockyards, Pontotoc, Mississippi, on the afternoon of March 14, 1984, and accompanied by Compliance Officer Joe L. Pigott, he observed four adult cows enclosed in a fenced dirt pen containing a watering trough and feed facilities. Two of these cows had tag numbers 63AA7581 and 63AA7582 in their left ears and a "B" branded on their left jaws. The other two cows wore backtags, numbers 63AA9376 and 63AA9383, sprayed with red paint indicating they were restricted cattle destined for slaughter. The first two digits are the code assigned to a particular State, e.g., "63"-Tennessee, "65"-Mississippi. The following two letters are the code assigned to a particular stockyard or sale barn, e.g., "AA"-South Memphis Stockyards Company (Tr. 34-36).

While Compliance Officer Valentine was still on the premises, Mr. Mooney arrived with a load of cattle which were not unloaded but which included another branded brucellosis reactor. When asked for the papers which accompanied the animals already in the pen and those on his truck, Mr. Mooney produced one VS Form 1-27, "Permit for Movement of Restricted Animals", a USDA form. The Permit, No. 656739, showed South Memphis Stockyards Co., Memphis, Tennessee (South Memphis) as the origin, Pioneer Beef Company, Grenada, Mississippi (Pioneer), as the destination, and Ralph Mooney as the shipper. The eartags of the three "B" branded cows on this form were listed as, 63FL7581, 63AA7582 and 63AA7584, and it was signed by Tennessee State Inspector Glen W. Curbo on the afternoon of March 13, 1984.² The Permit also contained a "Warning" that the "Livestock Must be Delivered to Consignee Without Diversion" (CX-3, Tr. 37, 47-48).

Mr. Valentine wrote up a statement based on his interview with Mr. Mooney on March 14, 1984; however, Mr. Mooney refused to sign it. The statement reflects that Mr. Mooney advised that on March 13, 1984, he transported cows in the penned area from South Memphis to Pontotoc, Mississippi. He also advised that it was the custom of the inspector at South Memphis to list each separate day's purchases on the same Permit, VS-1-27, and to issue only one Permit for all purchases, usually on the last day of the sales. He transported one of the "B" branded cows, No. 63AA7584, from South Memphis to Pontotoc on March 14, 1984. Mr. Mooney

² "Other Identification" listed for these reactor cows were Nos. 485326, 485325, and 454210 respectively.

could not provide a Health Certificate or Permit for Entry for other penned cows identified by red backtags, Nos. 63AA 63AA9383. Such documents were required to unload these at Pontotoc. Mr. Mooney's reason for transporting the pen to his Pontotoc Stockyard, rather than to Pioneer, was that he did not have a big enough load, and was waiting to bring more cattle before he hauled them to slaughter (CX-12, 13; Tr. 3).

In his testimony, Mr. Valentine reiterated what Mr. Mooney told him and which he recorded in the statement of March 14, 1984. Mr. Valentine was emphatic that Mr. Mooney advised him that date that he did not have the VS-1-27 form with him when he transported the two (2) "B" branded cows from South Memphis Stockyard to Pontotoc on March 13, 1984 (Tr. 42, 45). As a further corroboration, in an interview with Mr. Mooney and the circumstances surrounding his visit to Pontotoc on March 14, 1984, Mr. Valentine gave an affidavit to Compliance Officer Pigott on March 15, 1984. This statement reflects the presence of four adult cows on the premises of South Memphis Stockyard on March 14, 1984, two being branded brucellosis reactor cows and two wearing backtags sprayed with red paint. Mr. Valentine's affidavit repeats the same information provided in his oral testimony and contained in the unsigned statement of Mr. Mooney.

Mr. Joe L. Pigott, Compliance Officer, APHIS-USDA, in Memphis, Tennessee, accompanied Mr. Valentine, *supra*, to the South Memphis Stockyard, Pontotoc, Mississippi, on March 14, 1984. While there, he too observed four adult cows in the fenced pen and noted that two of the cows had backtags which had been sprayed with red paint. He also noted that two were branded as brucellosis reactor cows and bore brucellosis reactor tags in their left ears. Although he was asked the question Mr. Mooney concerning these cows, he was present during all of the questioning by Mr. Valentine. During this questioning, he heard Mr. Mooney explain that the reason for the four cows being at Pontotoc was that Mr. Mooney did not have a big enough load to transport to Pioneer and that he was waiting to obtain additional cows in order to make a load. At no time did he hear Mr. Mooney say that the four cows were there because his truck broke down (Tr. 113-114, 116). Mr. Pigott later obtained an affidavit from Mr. Valentine which reflected Mr. Mooney's answers to questions asked by Mr. Valentine on March 14, 1984 (CX-13). He also read over the statement Mr. Valentine had drawn up for Mr. Mooney to sign, which was not signed by Mr. Mooney (Tr. 116).

Mr. Glen Curbo, Livestock Inspector, Tennessee Department of Agriculture, was on duty in his official capacity at South Memphis Stockyard, Memphis, Tennessee, on March 13, 1984. He testified that he executed the VS-1-27 form, CX-3, at the request of Resp

Mooney because the latter had purchased two (2) brucellosis reactor cows at South Memphis on that date and intended to ship them to the Pioneer Beef Company, Grenada, Mississippi. Although he signed the VS-1-27 on March 13, 1984, he retained the form in his possession until Respondent Mooney signed it and picked it up on either March 14th or 15th, 1984. It is Mr. Curbo's practice to sign the VS-1-27 form on the date the brucellosis reactor cattle are purchased to indicate that the cattle must be slaughtered fifteen (15) days from that date in order to qualify the seller for the indemnity payment. Mr. Curbo is acquainted with Respondent Mooney and knows he purchases brucellosis reactor cows on a regular basis. Mr. Curbo testified with certainty that he retained the VS-1-27 form, dated March 13, 1984, in his possession until March 14 or 15, 1984, because of the manner in which he keeps control of the VS-1-27 forms in his office, and from the fact that one of the animals on the Form, No. 63AA7584, was not bought by Respondent Mooney at South Memphis until March 14, 1984, on which date it was added to the VS-1-27 form. Thus, Respondent Mooney did not have the VS-1-27 form with him when he transported the two brucellosis reactor cows from South Memphis to Pontotoc, Mississippi, on March 13, 1984.

Mr. Curbo further testified that on the VS-1-27 form he inadvertently recorded the backtag of one of the cows purchased by Respondent Mooney as 63FL7581. "FL" is the letter code for the sale barn at Cottierville, Tennessee, where he works at other times. The backtag number should properly have been recorded as 63AA7581 to show South Memphis as the place of purchase (CX-3, 9: Tr. 50-58).

Mr. Jimmy R. Odle, Compliance Officer, Veterinary Services, APHIS, USDA, Jackson, Tennessee, obtained an invoice and sale tickets from the Burnette-Carter Commission Agency (B-C) at South Memphis. Mr. Mooney has been assigned buyer's code M&M 324X by B-C. The invoice, dated March 13, 1984, shows that 4 head of cattle weighing a total of 3,030 lbs. were purchased on that date by Mr. Mooney (M&M 324X) for a total price of \$827.84 (CX-5). The separate sale tickets show the following : No. 178765—1 cow, weight-845 lbs., price-\$276.74, backtag no. 63AA9376; No. 178921—2 cows, weight-1,335 lbs., price \$347.10, backtag nos. 63AA7581 and 63AA7582; and No. 178931—1 cow, weight-850 lbs., price-\$204.00, backtag no. 63AA9383. It is noted that the weights and prices listed on these scale tickets for March 13, 1984, equal the totals found on the Burnette-Carter invoice ticket of the same date (CX-6, 7, 8). A fourth scale ticket, No. 191541, dated March 14, 1985, shows that Mr. Mooney purchased an additional cow on that

date. The weight was listed as 785 lbs. and the price paid to B-C as \$196.25. The cow is identified by backtag No. 63AA7584 (CX-5-9; Tr. 61-69).

Mr. Odle also obtained copies of "Brucellosis Test Record" from the official files of APHIS-USDA, Nashville, Tennessee. The records show a partial list of animals tested for brucellosis at South Memphis on March 13, 1985. They include two adult cows purchased by Mr. Mooney (M&M 324X), backtag Nos. 63AA9383 and 63AA9376 (CX-10, 11; Tr. 71-72).

Harvey F. McCrory, D.V.M., State Veterinarian for the State of Mississippi, stated in his affidavit of June 10, 1985, that his records failed to show that a Health Certificate was received from the South Memphis Stockyards Co. for a consignment of cattle to Ralph Mooney, Pontotoc, Mississippi, during the month of March, 1984. Additionally, he stated that a Permit for Entry was not requested for any cattle consigned to Ralph Mooney and brought into the State of Mississippi during the month of March, 1984 (CX-4, Tr. 39-41).

Respondent Ralph Mooney, Pontotoc, Mississippi, testified he operates the Pontotoc Stockyard which holds livestock sales every Saturday afternoon. He also purchases cattle for the Pioneer Beef Company, Grenada, Mississippi (Pioneer) on three days per week, Tuesdays, Wednesdays and Thursdays, at the South Memphis Stockyards, Memphis, Tennessee (South Memphis). For the past five years he has purchased cattle through Burnette-Carter (B-C), a commission agency operating at South Memphis. Usually he purchases restricted cows, i.e., "B" branded, and those bearing red backtags, and sells them to Pioneer which is a slaughtering plant. He is assigned No. M&M 324X as a buyer's code for the purpose of purchasing this type animal. On March 13, 1984, he purchased four head of cattle, two red tag reactor cows, and two "B" branded cows. He testified further that he intended to transport these four cows to his stockyard at Pontotoc, pick up six additional head of cattle he had purchased for Pioneer at Pontotoc the previous Saturday, and transport all ten cows to Pioneer, Grenada, Mississippi, on that date. However, he testified that he had muffler problems with his truck between Oxford and Pontotoc, Mississippi, which caused him to drop the trailer with the four cows off at his Pontotoc Stockyard and return to Pontotoc to have the truck repaired. He testified that because it was too late in the afternoon of March 13, 1984, to have the truck repaired, he returned the next morning, March 14, 1984, to have the truck repaired. Although he picked up the repaired truck around 9 o'clock on March 14, 1984, he testified that it was too late to drive the load from Pontotoc to Grenada, return to South

Memphis to pickup additional cattle, and then return again to Pioneer. Because of this, the four (4) head of cattle purchased at South Memphis on March 13, 1984, were unloaded at his Pontotoc Stockyard to be watered and fed, and he returned to South Memphis on March 14, 1984, to purchase additional cattle. It was when he returned from South Memphis to Pontotoc on March 14, 1984, that he was confronted by the APHIS Compliance Officers (Tr. 61, 82-90, 109).

Respondent placed in evidence a check drawn on his account, No. 193, dated March 16, 1984, in the amount of \$12.72. The check was issued to the "Muffler Center" for "Trk. Repair". Mr. Mooney testified that the check was issued on March 16, 1984, because he did not have his checkbook with him on the date the repairs were made, March 14, 1984 (RX-1; Tr. 90-91, 109). He also testified that he only had the VS-1-27 form with him on March 13, 1984, when he transported the four (4) head of cattle from South Memphis to Pontotoc, and that he returned with it to South Memphis the next day where his additional purchase of cattle was added to the form by the inspector. Mr. Mooney explained in his testimony that although this was not the usual procedure carried out at South Memphis, i.e., provide a buyer with the VS-1-27 form and return it the next day to have additional purchases of cattle entered on it, the inspector at South Memphis made an exception in his case (Tr. 92-93, 197). Finally, as to these cattle, Mr. Mooney testified that he transported all of the cattle from Pontotoc to Pioneer on March 14, 1984, and that they were eventually slaughtered (Tr. 95-98, 100).

Although Mr. Mooney acknowledges that Compliance Officer Valentine wrote out a statement for him to sign on March 14, 1984, he did not sign it. He testified that he told Mr. Valentine at that time that he stopped at Pontotoc because he had problems with his truck. Contrary to Mr. Mooney's testimony, this unsigned statement fails to show that Mr. Mooney advised Mr. Valentine of any truck problems. Rather, it shows that Mr. Mooney's divergence to Pontotoc was for the reason that he did not have enough cattle for a load to take to Pioneer (CX-12; Tr. 93, 110). Lastly, Mr. Mooney acknowledged in his testimony that Dr. Ward, *supra*, "probably" talked with him about the June 17, 1983, letter, *supra*, as well as informing him of the regulations governing the interstate movement of cattle (CX-1; Tr. 103-106).

Mrs. Joyce Mooney, Pontotoc, Mississippi, is the wife of the respondent. She testified that she was present on March 14, 1984, when Compliance Officers Valentine and Pigott were there. She not only heard the questioning of her husband, but also read aloud the statement Mr. Valentine had written out for her husband to

sign. She heard her husband say that the reason he stopped at Pontotoc was to pick up the six additional head of cattle owned by Pioneer and transport them to Grenada, Mississippi. She also recalled that her husband had the VS-1-27 form with him on March 14, 1984 and that he showed it to the Compliance Officers (Tr. 119-121).

It is noted here that the most direct route from South Memphis to Pioneer at Grenada, Mississippi, and the one traversed by Mr. Mooney, is due south via U.S. Highway 51, a distance of approximately 85 miles. In order to reach Pontotoc, Mississippi, from South Memphis one must proceed due south over U.S. Highway 51 to Batesville, Mississippi, a distance of approximately 53 miles, thence proceed due east over Mississippi Highway 6 to Pontotoc, a distance of approximately 57 miles. Thus, a trip from South Memphis to Pontotoc is a distance of approximately 110 miles. Proceeding westward to Batesville, Mississippi, over Mississippi Highway 6 (57) miles, thence south from Batesville over U.S. Highway 51 to Grenada, Mississippi (36) miles, a trip from South Memphis, Tennessee to Grenada, Mississippi, with a divergence to Pontotoc would be approximately 203 miles, or 118 miles longer than the direct 85 miles from South Memphis, Tennessee to Grenada, Mississippi (CX-2).

From the evidence of record it is clear that Respondent Mooney purchased four adult cows, two "B" branded (Nos. 63AA7581 and 63AA7582) and two with red backtags (Nos. 63AA9376 and 63AA9383) at South Memphis on March 13, 1984, and transported them to his Pontotoc Stockyard where they were unloaded on the same date, thereby completing an interstate movement. It is also clear from the testimony of experienced Compliance Officers, Messrs. Valentine and Pigott, and from the fact that experienced veterinary personnel found the red tagged cows to be brucellosis test eligible, that they were adult cows two years of age or over and therefore subject to the regulations.

The initial question here is whether or not Mr. Mooney had in his possession the VS-1-27 form when he transported these four (4) cows to his Pontotoc Stockyard on March 13, 1984. Mr. Mooney testified that he did. He also testified that this was the only document that accompanied the four (4) cows on this trip. He could not produce for Compliance Officer Valentine either a Health Certificate, or a Permit for Entry, for the two red tagged cows. Thus, assuming Mr. Mooney did have the VS-1-27 form in his possession when he transported these four (4) cows to Pontotoc on March 13, 1984, it must be noted that the Form only listed the two "B" branded cows, Nos. 63AA7581 and 63AA7582, and did not list the

two red tagged cows, Nos. 63AA9376 and 63AA9384. At this point alone, whether Mr. Mooney had problems with his truck or not, he violated § 71.18, 9 CFR § 71.18, in that the two red tagged cows were not accompanied by an owner's statement or other document, as required.

However, contrary to Mr. Mooney's assertion in his testimony that he did have the VS-1-27 form in his possession when he transported the four (4) cows to Pontotoc, is the testimony of Tennessee State Inspector Curbo who executed the VS-1-27 form at South Memphis. Inspector Curbo's procedure is to use only one VS-1-27 form for each buyer of "B" branded cattle for the three days of sales at South Memphis. Procedure requires that he retain this form in his possession and record on it the purchases made on each successive day. There are no exceptions. He signs and dates the form on the first day a purchase is made so that time commences running for the seller to collect the indemnity payment. Moreover, the form is only released to the buyer on the date of his last purchase. This procedure was followed with Mr. Mooney's purchases. Inspector Curbo testified with certainty on following this procedure, i.e., that the form was not released to Mr. Mooney until March 14 or 15, 1984, because of the fact that another "B" branded cow, No. 63AA7584, was purchased by Mr. Mooney on March 14, 1984, and added to the Form on that date. Thus, based on the credible testimony of Inspector Curbo alone, Mr. Mooney could not have had the VS-1-27 form in his possession when he transported the four (4) cows to Pontotoc on March 13, 1984. This is further buttressed by the scale ticket from B-C which showed that, indeed, Mr. Mooney purchased an additional animal on March 14, 1984, and by the testimony of Compliance Officer Valentine who stated Mr. Mooney told him on March 14, 1984, that he did not have the VS-1-27 form with him when he transported the cattle to the Pontotoc Stockyard on March 13, 1984. The testimony of Compliance Officer Valentine also shows that Mr. Mooney did not have a Health Certificate, nor a Permit for Entry for the two red tagged cows. This testimony is corroborated by the affidavit of the Mississippi State Veterinarian whose records failed to disclose that a Health Certificate had been received, or that a Permit for Entry was issued, for any cattle consigned to Ralph Mooney during the month of March 1984.

The second matter to be considered is whether Mr. Mooney's detour to Pontotoc was permitted under the regulations, and whether his testimony regarding muffler trouble with his truck deserves credence as a defense to his divergence and the unloading of the cattle at Pontotoc on March 13, 1984. The language of § 78.7, 9

CFR § 78.7, is explicit in that brucellosis reactor cattle, here Nos. 63AA7581 and 63AA7582, must be moved interstate directly to a recognized slaughtering establishment. "Directly" is not further enlarged upon in the regulations, presumably because it is a common usage adverb which is readily understood as: in direct line or manner; without anyone or anything intervening; immediately.³ Taking this meaning in the normal sense, divergence of 114 miles (Batesville to Pontotoc and return) from the normal 85 mile route, (South Memphis to Grenada via U.S. Highway 51) could hardly be said to be "directly" to a slaughtering establishment, Pioneer, as required by the regulations. Nor has any regulation been cited requiring the necessity for detour to feed and water animals.

In reference to Mr. Mooney's testimony regarding muffler problems with his truck on March 13, 1984, it is noted here that it purportedly occurred between Oxford and Pontotoc, Mississippi. Oxford is located approximately halfway between the 57-mile distance between Batesville, the turnoff point from U.S. Highway 51, and Pontotoc. Thus, Mr. Mooney at that point was well on a detour which was not "directly" to a slaughtering establishment. Nevertheless, the record also shows that at the time Mr. Mooney was questioned by Compliance Officer Valentine on March 14, 1984, he made no mention of truck problems as the cause of his detour to Pontotoc and unloading the cattle there. Rather, his reason was that he was waiting to obtain a full load of cattle before proceeding to Pioneer. Although Mr. Mooney did not sign the statement prepared by Compliance Officer Valentine, Mrs. Mooney testified that she was present during the interview with her husband and read the statement aloud in the presence of the group. The statement is of record and makes no reference to truck problems nor does it indicate that any changes or corrections in the statement were requested by Mr. Mooney. Further, I find little credibility in Mr. Mooney's testimony that he did not pay for the muffler repairs on March 14, 1984, when he picked up the repaired truck, because he did not have his checkbook with him. As noted previously, after picking up his truck he proceeded to South Memphis to purchase additional cattle.

FINDINGS OF FACT

1. Ralph Mooney, respondent, is an individual whose address is P. O. Box 217, Pontotoc, Mississippi 38863.
2. The respondent operates a specifically approved stockyard in Pontotoc, Mississippi.

³ "The American Heritage Dictionary" (Houghton-Mifflin, 1976).

3. Brucellosis is an infectious, contagious, and communicable disease of cattle which also affects humans and is known in humans as undulant fever.

4. The regulations in Title 9, Code of Federal Regulations, Part 71.1 *et seq.*, and Part 78.1 *et seq.*, are an integral and significant part of the federal and state cooperative efforts to control and eradicate brucellosis.

5. On March 13, 1984, Tennessee was classified as a Class B State, 9 CFR § 78.20(c).

6. The cattle identified below as 63AA9376 and 63AA9383 were adult cattle, two years of age or over.

7. On March 13, 1984, the respondent moved interstate from Memphis, Tennessee to Pontotoc, Mississippi, approximately four (4) cattle, identified by eartag numbers 63AA7581, 63AA7582, and backtag numbers 63AA9376 and 63AA9383, in violation of section 71.18 of the regulations because the cattle were not accompanied by an owner's statement or other document, as required.

8. On or about March 13, 1984, the respondent moved interstate from Memphis, Tennessee to Pontotoc, Mississippi, approximately two (2) cattle, identified by eartag numbers 63AA7581 and 63AA7582, in violation of section 78.7 of the regulations because the cattle were brucellosis reactors and were not moved for immediate slaughter directly to a recognized slaughtering establishment, as required.

9. On or about March 13, 1984, the respondent moved interstate from Memphis, Tennessee to Pontotoc, Mississippi, approximately two (2) cattle which were identified with the backtags of 63AA9376 and 63AA9383, in violation of section 78.9(c) of the regulations because the cattle were not accompanied by a Health Certificate and a "Permit for Entry", as required.

CIVIL ASSESSMENT

Section 122 of Title 21 of the United States Code provides for the assessment of a civil penalty "of not more than one thousand dollars" for each violation of the regulations published pursuant to authority granted to the Secretary of Agriculture in §§ 111 and 120 of Title 21 of the United States Code. The Secretary has issued such regulations governing the interstate transportation of cattle, as here pertinent: §§ 71.18, 78.7 and 78.9, 9 CFR §§ 71.18, 78.7 and 78.9. Each is a separate and distinct violation subject to the maximum penalty of \$1,000. Severe sanctions for violation of the Department's regulations has been an established policy. *In re Braxton Worsley*, 33 Agric. Dec. 1547, 1556-71 (1974); see also *In re Donald Hageman, S&H Hogs, Inc., et al.*, 42 Agric. Dec. 531, 546

(1983) and cases cited therein. The complainant here seeks the maximum civil penalty assessment for each proven violation. The evidence of record is void of any mitigating or extenuating circumstances which would lessen the assessment of the maximum penalty. Rather, it shows the respondent to be an experienced cattle dealer, the operator of a stockyard, one who has been previously made aware of the regulations, and one who has had a prior caution as to violation of the same regulations involved here. Therefore, the evidence of record supports the requested assessment of \$1,000 for each violation alleged and proven as appropriate to accomplish the goals of compliance and deterrence of respondents and others similarly situated.

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Respondent contends on appeal that the evidence does not support the findings of fact, and that respondent's motion to dismiss should have been granted. However, there is more than enough evidence to support the findings of fact. Complainant need only prevail by a preponderance of the evidence.⁴

Respondent also contends that the civil penalties totalling \$3,000 are unwarranted. Respondent contends that only a single violation occurred. However, respondent's actions in connection with the four cattle involved here constituted three separate violations and, therefore, a civil penalty of \$1,000 may be assessed as to each violation (21 U.S.C. § 122).

The record here supports the assessment of civil penalties totalling \$3,000 for the serious violations found here. As stated in *In re Grady*, 45 Agric. Dec. —, slip op. at 67 (Jan. 31, 1986):

The brucellosis eradication program is important to the national welfare. To date, the program has cost in excess of \$1 billion. It costs about \$150 million a year (Tr. 440). There is no excuse for respondents' complete disregard of the regulatory requirements.

The Brucellosis Eradication Program is described in *In re Petty*, 43 Agric. Dec. —, slip op. at 4-5 (Oct. 31, 1984), appeal docketed, No. 3-84-2200-R (N.D. Tex. Dec. 19, 1984), as follows:

⁴ See *Herman & MacLean v Huddleston*, 459 U.S. 375, 387-92 (1983); *Steadman v. SEC*, 450 U.S. 91, 92-104 (1981); *In re Rowland*, 40 Agric. Dec. 1984, 1941 n.5 (1981), *aff'd* 713 F.2d 179 (6th Cir. 1983); *In re Gold Bell-I&S Jersey Farms, Inc.*, 37 Agric. Dec. 1336, 1346 (1978), *aff'd*, No. 78-3134 (D.N.J. May 25, 1979), *aff'd mem.*, 614 F.2d 770 (3d Cir. 1980).

4. Brucellosis (also known as Bangs disease or undulant fever) is a contagious, infectious and communicable disease affecting livestock. It is transmittable to humans.⁴ (Tr. 32, 95-96, 1056-59, 1160-64, 1177-80). The incubation period of the disease varies from about 10 days to a year, but does not generally exceed several months (Tr. 95, 1180).

⁴ Brucellosis is "a disease of man of sudden or insidious onset and long duration characterized by great weakness, extreme exhaustion on slight effort, night sweats, chilliness, remittent fever, and generalized aches and pains and acquired through direct contact with infected animals or animal products or from the consumption of milk, dairy products, or meat from infected animals" (Webster's Third New International Dictionary, Unabridged (1981), at 285).

For many years the Federal Government has maintained a vigorous and costly program directed to the control and eradication of this disease (Tr. 32-33, 1059-63). For example, in 1980, the Federal Government spent \$73,715,667 for brucellosis eradication (1982 Budget Explanatory Notes, USDA, vol. 2, at 8). To control the disease, some entire herds of cattle are destroyed, with some indemnification from the Federal Government (9 CFR § 51.3(a)(2) (1980); Tr. 239-41). Because of the large economic impact of the cattle industry on the nation, the success of the Brucellosis Eradication Program is of national importance.

In carrying out the Brucellosis Eradication Program, the Federal Government, through regulations issued by the United States Department of Agriculture, regulates the interstate movement of cattle. 9 CFR Part 78 (1980).

Respondent was warned on June 17, 1983, in a certified letter from the Department about violations similar to those involved here, and a copy of the regulations was sent to respondent (CX 1). In addition, as the ALJ noted, Dr. Ward spoke to respondent on several occasions with respect to the regulations. Accordingly, respondent's violations here were flagrant and serious violations of the Brucellosis Eradication Program.

It is the policy of this Department to impose severe sanctions for serious violations of any of the regulatory programs administered by the Department to serve as an effective deterrent not only to the respondents, but also to other potential violators. This policy has been followed in all of the Department's disciplinary proceedings in recent years.

The basis for the Department's severe sanction policy is set forth at great length in numerous decisions, e.g., *In re Worsley*, 33 Agric. Dec. 1547, 1556-71 (1974),⁵ which is set forth as an appendix to this decision.⁶ The Department's sanction policy is also discussed at length in *In re Esposito*, 38 Agric. Dec. 613, 624-65 (1979).

For the foregoing reasons, the following order should be issued.

ORDER

Ralph Mooney, respondent, is assessed a civil penalty of \$3,000 (\$1,000 per violation). The civil penalty shall be payable to the "Treasurer of the United States" by certified check or money order and shall be forwarded to Kris H. Ikejiri, Office of the General Counsel, Room 2422-South Building, United States Department of Agriculture, Washington, D.C. 20250-1400, within 60 days after service of this order.

⁵ The Department's severe sanction policy did not originate with *Worsley*, but, rather, was mentioned briefly in the first decision issued by the present Judicial Officer, *In re Henner*, 30 Agric. Dec. 1151, 1263-64 (1971), and was further developed in numerous other decisions before it was finalized in *In re Miller*, 33 Agric. Dec. 53, 64-80 (1974), *aff'd per curiam*, 498 F.2d 1088 (5th Cir. 1974).

⁶ Severe sanctions issued pursuant to the Department's severe sanction policy were sustained, e.g., in *In re Collier*, 38 Agric. Dec. 957, 971-72 (1979), *aff'd per curiam*, 624 F.2d 190 (9th Cir. 1980) (unpublished); *In re Gold Bell-I&S Jersey Farms, Inc.*, 37 Agric. Dec. 1336, 1362-63 (1978), *aff'd*, No. 78-3134 (D.N.J. May 25, 1979), *aff'd mem.*, 614 F.2d 770 (3d Cir. 1980); *In re Muchlenthaler*, 37 Agric. Dec. 313, 330-32, 337-52, *aff'd mem.*, 590 F.2d 340 (8th Cir. 1978); *In re Mid-States Livestock, Inc.*, 37 Agric. Dec. 547, 549-51 (1977), *aff'd sub nom. Van Wyk v. Bergland*, 570 F.2d 701 (8th Cir. 1978); *In re Cordele Livestock Co.*, 36 Agric. Dec. 1114, 1133-34 (1977), *aff'd per curiam*, 575 F.2d 879 (5th Cir. 1978) (unpublished); *In re Livestock Marketers, Inc.*, 35 Agric. Dec. 1552, 1561 (1976), *aff'd per curiam*, 558 F.2d 748 (5th Cir. 1977), *cert. denied*, 435 U.S. 988 (1978); *In re Catanzaro*, 35 Agric. Dec. 26, 31-32 (1976), *aff'd*, No. 76-1613 (9th Cir. Mar. 9, 1977), *printed in* 36 Agric. Dec. 467; *In re Maine Potato Growers, Inc.*, 34 Agric. Dec. 773, 796, 801 (1975), *aff'd*, 540 F.2d 518 (1st Cir. 1976); *In re M. & H. Produce Co.*, 34 Agric. Dec. 700, 750, 762 (1975), *aff'd*, 549 F.2d 230 (D.C. Cir.), *cert. denied*, 434 U.S. 920 (1977); *In re Southwest Produce, Inc.*, 34 Agric. Dec. 160, 171, 178, *aff'd per curiam*, 524 F.2d 977 (5th Cir. 1975); *In re J. Aceedo & Sons*, 34 Agric. Dec. 120, 133, 145-60, *aff'd per curiam*, 524 F.2d 977 (5th Cir. 1975); *In re Marvin Tragash Co.*, 33 Agric. Dec. 1884, 1913-14 (1974), *aff'd*, 524 F.2d 55 (5th Cir. 1975); *In re Trenton Livestock, Inc.*, 33 Agric. Dec. 499, 515, 539-50 (1974), *aff'd per curiam*, 510 F.2d 966 (4th Cir. 1975) (unpublished); *In re Miller*, 33 Agric. Dec. 53, 64-80, *aff'd per curiam*, 498 F.2d 1088, 1089 (5th Cir. 1974).

APPENDIX Excerpt from *In re Worsley*, 33 Agric. Dec. 1547, 1556-71, (1974).

U.S.D.A. SANCTION POLICY

[Excerpt omitted.—Ed.]

In re: ROBERT CARSON d/b/a CARSON'S TAXIDERMIST, INC. A.Q.
Docket No. 226. Decided March 12, 1986.

Victor W. Palmer, Administrative Law Judge

Kevin B. Thiemann, for complainant.

For respondent, *pro se*.

CONSENT DECISION

This proceeding was instituted under the Act of February 2, 1903, as amended (Act) (21 U.S.C. §§ 111 and 120), by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service alleging that Robert Carson, d/b/a Carson's Taxidermist, Inc., respondent, violated the Act and regulations promulgated thereunder (9 CFR § 95.1 *et seq.*). The parties have agreed that this proceeding should be terminated by entry of the Consent Decision set forth below and have agreed to the following stipulations:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, respondent specifically admits that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining allegations in the complaint, admits to the Findings of Fact set forth below, and waives:

(a) any further procedure;

(b) any requirement that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law, or discretion, as well as the reasons or bases thereof;

(c) all rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. Respondent also stipulates and agrees that the United States Department of Agriculture is the "prevailing party" in this proceeding and waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by the respondent in connection with this proceeding.

FINDINGS OF FACT

1. Robert Carson, respondent, is an individual whose mailing address is 16 Verbena Avenue, Floral Park, New York 11001, and who is doing business as Carson's Taxidermist, Inc.

2. In November 1983, Carson's Taxidermist, Inc., was an establishment approved by the United States Department of Agriculture, Veterinary Services, for the receipt and handling of restricted import animal byproducts.

3. On or about November 21, 1983, the respondent released from his establishment deer antlers and their accompanying cardboard boxes which had been imported into the United States from the People's Republic of China.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and having agreed to the provisions set forth in the following order in disposition of the proceeding, such order and decision will be issued.

ORDER

The respondent is assessed a civil penalty of five hundred dollars (\$500.00) which shall be payable to the "Treasurer of the United States" by certified check or money order, and which shall be forwarded to Kevin B. Thiemann, Office of the General Counsel, Room 2422 South Building, United States Department of Agriculture, 12th and Independence Avenue, S. W., Washington, D. C. 20250-1400, within thirty (30) days from the effective date of this order.

This order shall become effective on the day upon which service of this order is made upon the respondent.

In re: CHARLES BOWEN, A.Q. Docket No. 215. Decided January 30, 1986.

Victor W. Palmer, Administrative Law Judge.

Jaru Ruley, for complainant.

For respondent, pro se.

DECISION AND ORDER

This is an administrative proceeding for the assessment of a civil penalty for a violation of the regulations governing the interstate movement of cattle because of brucellosis (9 CFR §§ 78.1 *et seq.*),

hereinafter referred to as the regulations, in accordance with the Rules of Practice in 9 CFR §§ 70.1 *et seq.* and 7 CFR §§ 1.130 *et seq.*

This proceeding was instituted by a complaint filed on October 30, 1985, by the Acting Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. The complaint alleged that on or about November 12, 1984, respondent moved four cattle interstate from his brucellosis quarantined herd in McCurtain County Oklahoma, to the D&W Packing Company, Texarkana, Texas, in violation of section 78.8 of the regulations (9 CFR § 78.8) in that the cattle were not "S" branded when they moved. In his answer, respondent admitted the material allegations contained into the complaint, thereby waiving a hearing. (See 7 CFR § 1.139).

Accordingly, the material facts alleged in the complaint are adopted and set forth herein as the findings of fact, and this decision is issued pursuant to section 1.139 of the Rules of Practice applicable to this proceeding. (See 7 CFR § 1.139).

FINDINGS OF FACT

1. Respondent, Charles Bowen, is an individual whose address is Box 156, Bethel, Oklahoma 74724.

2. On or about November 12, 1984, the respondent moved interstate four cattle from his brucellosis quarantined herd in McCurtain County, Oklahoma, to the D&W Packing Company, Texarkana, Texas, in violation of section 78.8 of the regulations (9 CFR § 78.8) because the cattle were not "S" branded when they moved interstate, as required.

CONCLUSION

By reason of the facts contained in the Findings of Fact above, the respondent has violated section 78.8 of the regulations (9 CFR § 78.8).

Therefore, the following Order is issued.

ORDER

Respondent, Charles Bowen, is hereby assessed a civil penalty of three hundred dollars (\$300.00). This penalty shall be payable to the "Treasurer of the United States" by certified check or money order, and shall be forwarded to Jaru Ruley, Office of the General Counsel, Room 2422 South Bldg., United States Department of Agriculture, Washington, D. C. 20250-1400, within thirty (30) days from the effective date of this order. This order shall have the same force and effect as if entered after a full hearing and shall be final and effective 35 days after service of this Decision and Order

upon respondent, unless there is an appeal to the Judicial Officer pursuant to section 1.145 of the Rules of Practice applicable to this proceeding (7 CFR § 1.145).

[The Decision and Order became final on March 13, 1986.—Ed.]

In re: JOHNNY DOBSON, LARRY FREELAND and SPEEDWAY TRANSPORTATION, INC., A.Q. Docket No. 168. Decided March 14, 1986.

Edward McGrail, Administrative Law Judge.

Kris Ikejiri, for complainant

Patrick Nelson, Kearney, NE, for respondent.

CONSENT DECISION AND ORDER AS TO LARRY FREELAND

This proceeding was instituted under the Act of February 2, 1903, as amended (Act) (21 U.S.C. Section 111 and 120), by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service alleging that Larry Freeland and others, violated the Act and regulations promulgated thereunder (9 CFR Section 1.1 *et seq.* and 78.1 *et seq.*). Respondent Larry Freeland and the complainant have agreed that this proceeding should be terminated by entry of the Consent Decision set forth and have agreed to the following stipulations:

1. For the purposes of this stipulation and the provisions of his Consent Decision only, respondent Larry Freeland admits specifically that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining allegations in the complaint, admits to the Findings of Fact set forth below, and waives:

(a) Any further procedure;

(b) Any requirement that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law or discretion, as well as the reasons or bases therefor;

(c) All rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. Respondent Larry Freeland stipulates and agrees that the United States Department of Agriculture is the "prevailing party" in this proceeding, and waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. Section 504 *et seq.*) for fees and other expenses incurred by the respondent in connection with this proceeding.

3. Complainant, the Animal and Plant Health Inspection Service of the U. S. Department of Agriculture, stipulates and agrees

that it will not bring any administrative actions and will not recommend to the Department of Justice that it take any civil or criminal actions on the alleged movements of cattle from Nebraska to Kansas and Kansas to Nebraska in July of 1984 by, or on behalf of, respondent Larry Freeland and Alma Livestock Commission Company, Inc., of which respondent is president.

FINDINGS OF FACT

1. Larry Freeland, respondent, is an individual whose address is Box 409, Alma, Nebraska 68920
2. On or about August 1, 1984, the respondent moved interstate from Sulphur Springs, Texas, to Alma, Nebraska, approximately 44 cattle.

CONCLUSIONS

Respondent Larry Freeland having admitted the jurisdictional facts and having agreed to the provisions set forth in the following Order in disposition of this proceeding, such Order and Decision will be issued.

ORDER

Respondent Larry Freeland is assessed a civil penalty of one thousand five hundred dollars (\$1,500.00) which shall be payable to the "Treasurer of the United States", by certified check or money order, and which shall be forwarded to Kris H. Ikejiri, Office of the General Counsel, Room 2422 South Building, United States Department of Agriculture, Washington, D.C. 20250-1400, within thirty (30) days from the effective date of this Decision and Order.

This Decision and Order shall become effective on the day of service upon the respondent.

In re: BILLY VAN NORMAN, A.Q. Docket No. 43. Decided February 3, 1986.

Dorothea A. Baker, Administrative Law Judge.

Jaru Ruley, for complainant.

Timothy E. Hurley, Jackson, Mississippi, for respondent.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is an administrative disciplinary proceeding arising by reason of a Complaint filed on February 24, 1984, by the Acting Ad-

ministrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. Therein the Respondent was charged with having violated the Act of February 2, 1903, as amended (21 U.S.C. sections 111 and 120), and the regulations promulgated thereunder, found in 9 CFR section 78.1 *et seq.* The Respondent filed an Answer on March 20, 1984, and an Amended Answer was filed on September 20, 1984. Thereafter, at the oral hearing, the Complainant amended the Complaint to delete Count V, and the requested penalties were reduced from \$2,000.00 to \$1,500.00.

This case arose from the routine transport of four adult cows across the Mississippi/Louisiana State line and their transfer to a larger vehicle for transport to a Texas slaughtering establishment.

In the complaint filed in this proceeding, it was alleged that on or about August 25, 1983, the Respondent shipped, interstate, four cows from Columbia, Mississippi, to Kentwood, Louisiana, in violation of sections 71.18 and 78.9(d)(3)(iii) of the regulations because the cows, which were over 24 months of age and which allegedly did not go directly to a slaughter establishment or to a quarantined feedlot, moved interstate unaccompanied by an owner's statement or other acceptable document, and a certificate showing prescribed information, and a "Permit for Entry," as required.

In his Amended Answer the Respondent admitted that on or about August 25, 1983, he was a driver of a truck carrying cows from Columbia, Mississippi, to Kentwood, Louisiana. Respondent denied the remaining allegations and stated he would affirmatively show that the cows in question did go directly to slaughter. Respondent specifically denied that he shipped or was a shipper of any cows.

At the oral hearing it was stipulated among other things:

(1) The cattle in question were all over 24 months of age and were slaughtered at the Calhoun Packing Company, Palestine, Texas, on August 26, 1983, the day after they were transported across State lines by the Respondent;

(2) That the Stringer Sale Barn, Columbia, Mississippi, from which the cows moved in interstate, was a specifically approved stockyard and that the cows in question were subjected to a premovement brucellosis test in the 30 days immediately prior to the interstate movement and the results of that test were negative for all cows;

(3) That at the point of arrival at Hatcher Dairy Farm, a dealer assembly point in Kentwood, Louisiana, the cows were unloaded from the truck they had been moved in;

(4) That the cows were subsequently moved from Kentwood, Louisiana, to Palestine, Texas, by someone other than Respondent; and

(5) That no owner's statement or "other document" listing Kentwood, Louisiana, as the destination, accompanied the movement from Columbia, Mississippi, to Kentwood, Louisiana.

This is a case of first impression, particularly with respect to the issue of whether the cattle in question went "directly to a recognized slaughtering establishment" under 9 CFR section 78.9(d)(1)(iii). There is no published case nor published interpretation as to what is meant by going directly to a slaughtering establishment. Respective counsel have not located any authority defining this terminology.

If the cattle in question had gone directly to a recognized slaughtering establishment, it was not necessary that such cattle be accompanied by certain documents, the absence of which is alleged to be a violation of 9 CFR section 78.9(d)(3)(iii).

The Respondent raises the issue as to the validity of the Complainant's position as to the imposition of a fine based on two violations for an alleged violation where only one regulation is violated.

An oral hearing took place on January 15, 1985, in Jackson, Mississippi. The Complainant was represented by Jaru Ruley, Esquire, Office of the General Counsel, United States Department of Agriculture, Washington, D. C. 20250. The Respondent was represented by John B. Clark, Esquire, and Timothy E. Hurley, Esquire, of Daniel, Coker, Horton and Bell, Attorneys at Law, Post Office Box 94, Jackson, Mississippi, 39205. In due course the parties file Briefs, the last Brief having been filed herein on April 2, 1985.

STATEMENT OF THE LAW

As herein pertinent, *21 U.S.C. § 120* provides that:

In order to enable the Commissioner of Agriculture [Secretary of Agriculture] to effectually suppress and extirpate contagious pleuropneumonia, foot-and-mouth disease, and other dangerous contagious, infectious, and communicable diseases in cattle and other livestock and/or live poultry and to prevent the spread of such diseases, he is authorized and directed from time to time to establish such rules

and regulations concerning the exportation and transportation of livestock and/or live poultry from any place within the United States where he may have reason to believe such diseases may exist into and through any State or Territory [, including the Indian territory], and into and through the District of Columbia and to foreign countries as he may deem necessary, and all such rules and regulations shall have the force of law.

21 U.S.C. § 122 provides that:

Any person, company, or corporation knowingly violating the provisions of this Act or the orders or regulations made in pursuance thereof shall be guilty of a misdemeanor, and on conviction shall be punished by a fine of not less than one hundred dollars nor more than five thousand dollars, or by imprisonment not more than one year, or both such fine and imprisonment. Any person, company, or corporation violating such provisions, orders, or regulations may be assessed a civil penalty by the Secretary of Agriculture of not more than one thousand dollars. The Secretary may issue an order assessing such civil penalty only after notice and an opportunity for an agency hearing on the record. Such order shall be treated as a final order reviewable under chapter 158 of title 28, United States Code [28 USCS §§ 2341 et seq]. The validity of such order may not be reviewed in an action to collect such civil penalty.

9 CFR § 71.18(a)(1) provides, in relevant part, that:

All cattle, except for certain exceptions not applicable here, two years of age or over, may be moved interstate if "accompanied by a statement signed by the owner or shipper of the cattle or other document stating . . . (b) the destination of the animals"

9 CFR § 78.5 provides that:

Cattle may not be moved interstate except in compliance with the regulations in this subpart.

9 CFR § 78.9 provides, in relevant part, that:

Cattle from herds not known to be affected with brucellosis must be moved interstate in compliance with § 71.18 of

this subchapter, except where specifically exempted, and then only as follows:

* * * * *

(d) *Class C States.*

(1) *Movement for immediate slaughter.*

* * * * *

(iii) Such cattle from other than a farm of origin or a nonquarantined feedlot may also be moved interstate directly to a recognized slaughtering establishment, if they have been tested negative within 30 days prior to movement, or if they are "S" branded and are accompanied by an "A" brand permit.

(iv) Such cattle from other than a farm of origin or a nonquarantined feedlot may also be moved interstate for immediate slaughter to a recognized slaughtering establishment without being "S" branded, if they are accompanied by a VS Form 1-27 permit and are moved in vehicles closed with official seals. Official seals shall only be applied or removed by a Veterinary Services representative, a State representative, an accredited veterinarian, or by other persons authorized for this purpose by the Veterinary Services representatives.

(2) *Movement to quarantined feedlot.*

* * * * *

(3) *Movement other than in accordance with paragraphs (d)(1) or (2) of this section.* Such cattle may be moved other than in accordance with paragraph (d)(1) or (2) of this section only if:

(iii) Such cattle have been subjected to two consecutive official negative tests for brucellosis with the first test not less than 60 days before interstate movement and the second test not less than 60 days after the first test nor more than 30 days before the date of the interstate movement, provided however, that the time period for the first test is valid up to 12 months. These tested cattle shall be accompanied by a certificate which shows, in addition to the items required under § 78.1(n), the dates and results of

the official tests required by this paragraph and shall be accompanied by a "Permit for Entry";

FINDINGS OF FACT

1. Respondent, Billy Van Norman, sometimes herein referred to as "Respondent," is an individual, whose mailing address is Route 2, McComb, Mississippi 39648.

2. Respondent, Billy Van Norman, was, on August 25, 1983, in the business of purchasing and hauling livestock for others. He operates out of his home and has no employees. His only equipment is a truck and trailer.

3. On August 25, 1983, Respondent purchased four adult cows, for Mr. William Hatcher, at the Stringer Sale Barn, Columbia, Mississippi. In purchasing the four cows, Respondent acted as subagent, at the request of Mr. William Hatcher, who in turn acted as agent for the Calhoun Packing Company, of Palestine, Texas. On the same date, Respondent also purchased four calves at the Stringer Sale Barn.

4. Respondent hauled the four cows and four calves across the state line to the Hatcher Dairy Farm, in Kentwood, Louisiana. One of the cows left the trailer during the trip to the Hatcher Dairy Farm in Kentwood.

5. Respondent was stopped at a road check, at 5:30 p. m., the first four years, with the four cows and four calves. Respondent didn't have the health papers and said he did not believe they were needed inasmuch as the cattle were moving directly to slaughter. At this point there was no violation and when Exhibit No. 1 was filled out, there was no violation indicated.

6. It is the custom and common practice in the State of Mississippi that various "gooseneck" trailer trucks bring small loads of cattle to a central location where the cattle are then placed in a larger truck. It is impracticable to load cattle directly from a "gooseneck" to a "double-deck" truck.

7. The four cows in question had tested negatively to a brucella test within 30 days prior to August 25, 1983.

8. Respondent, Billy Van Norman, moved the four cows, interstate, to a dealer assembly point known as Hatcher Dairy Farm, Kentwood, Louisiana.

9. The only document which accompanied the interstate movement of the four cows was a sales invoice which listed Calhoun Packing Company as the buyer.

10. It is approximately 400 miles from Columbia, Mississippi, to Palestine, Texas, the location of Calhoun Packing Company.

11. When Respondent arrived at the Hatcher Dairy Farm, a "double-deck" truck was waiting at the chute normally used by such trucks.

12. Respondent unloaded the four calves into a pen and placed the four mature cows in the alley between the pens.

13. An "alley" is a walkway or passageway between pens, and is not a pen.

14. Respondent was present at the Hatcher Dairy Farm, for approximately 15 minutes.

15. Respondent received \$35.00 for his hauling fee and left the Hatcher Dairy Farm, while the mature cows were still in the "alley."

16. Respondent believed he was complying with the law and he acted in a reasonable and good faith belief that the mature cows were about to be loaded onto the "double-deck" truck for transport to Palestine, Texas. Although Respondent could have turned around to have avoided the road check, he did not do so because he "had no reason" to turn around. He thought he was in compliance. Respondent was justified in believing that the four cattle were about to be loaded for transport to Palestine.

17. The four adult cows reached Palestine, Texas, the next morning, August 26, 1983, and were slaughtered there that day.

18. Given the distance from Columbia, Mississippi, to Palestine Texas, and the times that the cattle departed from Mississippi and arrived in Texas, the cattle could not have remained at the Hatcher Dairy Farm, for a period longer than two or three hours, if that long. What happened to the cattle after Respondent left was not shown by the evidence, but inasmuch as Respondent was stopped at the road check at 5:30 p. m., and the cattle were slaughtered the next day, it seems doubtful that the cattle remained more than a few minutes in the "alley," as such presence would have interfered with the loading of other cattle.

19. Brucellosis is a communicable disease of cattle, but consumption of meat from infected animals poses no risk to man, and cattle with brucellosis may be sold for slaughter.

20. The Calhoun Packing Company is a "recognized slaughtering establishment" as that term is defined in 9 CFR section 78.18.

21. The violation on Complainant's Exhibit No. 1 was put in later when a determination was made that the cattle were not shipped "directly" to slaughter. Thus, on September 1, an initial determination was made of alleged violations because of the "holding pens" at Hatcher Dairy Farm.

22. The testimony is indisputable that there is nothing in the regulations specifically defining what is meant by direct movement

nor is there anything in the regulations which specifically prohibit loading and unloading of cattle when they are involved in a shipment to slaughter.

23. A knowledgeable and experienced witness, Mr. Minter, testified. He is employed by the Southeast Mississippi Livestock Farmers Association. He is a long standing President of the Mississippi Livestock Association, a trade association, which is composed of 60 to 80 members. Said witness has been a dealer, buyer, auctioneer, stockyard manager, scale man, and has engaged in other livestock activities as well as having had experience in transporting cattle in many States. Although there were no regulations pertaining to the transfer of cattle from the smaller trucks, i.e., the "gooseneck" trailers into the moving vans that take the cattle to slaughter, it was his opinion that the movement of cattle in this particular case was not in violation of the rules and regulations and he expressed the view that the temporary presence of the animals at Hatcher's appeared to him to be a direct movement to slaughter. This was in accord with his understanding of what had occurred in prior years. He also made reference to a symposium of United States Department of Agriculture, Animal Health Inspection, personnel in Fort Worth, Texas, which was attended by Mr. Bert Harkins, Administrator, relative to the brucellosis program, at which time Mr. Harkins appealed for a common sense application with respect to the rules and regulations. Mr. Minter was a knowledgeable witness and explained the cattle could not be unloaded from a "gooseneck" truck directly into an 18 wheeler; that such a movement required an unloading and reloading; that the practice of bringing cattle into a central assembly point in little haulers, and reloading them into the larger trucks was widespread in Mississippi and that it would be ruinous for the Mississippi livestock industry if this were precluded. He also testified that he was of the opinion that what occurred in this case was a direct movement and it met all the requirements of the regulations.

24. The unloading and loading of cattle from "gooseneck" trucks into the 18 wheeler trucks is a widespread and prevalent practice, at least in the State of Mississippi, where the cattle are brought in, on smaller trucks, and then for economy and other reasons are reloaded onto another truck. As a practical matter, all of the smaller "gooseneck" trucks do not arrive at the precise minute of all others, and accordingly, the cattle may well be placed on the ground for a few minutes or a short time pending the reloading procedures onto the larger truck.

25. If the original "gooseneck" truck had transported the cattle without stopping or unloading, there would be no issue herein. The

only reason a question arises here is because of the unloading and reloading procedures.

26. The question of whether or not the cattle should have been accompanied by a certificate and a "Permit for Entry," in compliance with section 78.9(d)(3)(iii) of the regulations (9 CFR section 78.9(d)(3)(iii)), depends upon whether or not the four cows in question went directly to a recognized slaughtering establishment. If they did, the sales invoice, showing Calhoun Packing Company as the concern that the cows were sold to, would have been acceptable to satisfy the requirement of 9 CFR section 71.18. Under the regulations a waybill can be an appropriate document to accompany cattle which are moving interstate to slaughter. The invoice which accompanied the four cattle here showed the weights and numbers of each animal and the name of the purchaser and herd owner's name.

27. The burden of proof is on the Agency to establish that a violation of the Act and regulations occurred. This burden has not been achieved. The regulations do not define what is meant by direct movement. The unloading—reloading activity of Respondent on August 25, 1983, was consonant with a widespread accepted practice in the industry in this part of the Country. The agency, of course, is not precluded from issuing appropriate regulations which would prohibit such unloading—reloading, and defining the manner in which "direct" movement is interpreted. It has not done so.

28. As far as Respondent is concerned, the cattle in question in this proceeding went directly to slaughter, and were, therefore, not required to be accompanied by the documents prescribed by 9 CFR section 78.9(d)(3)(iii).

29. The invoice accompanying the cattle was a proper "statement signed by the owner or shipper of the cattle, or other document" under 9 CFR section 71.18(a)(1)(i).

30. No violation of the Act and regulations has been proven in this case.

CONCLUSIONS

There is lack of precedent with respect to this case inasmuch as there is no decided authority as to what is meant by direct movement to slaughter. From the testimony of the witnesses, it can easily be discerned that any interpretation at the present time is subjective, absent regulations of definition.

There are no regulations relating to what is permissible with respect to the transfer of cattle under the circumstances herein. It is the position of the Complainant, through its witnesses, that once

an animal is "penned" it is not "direct" movement but rather it is under the control of the person who owns the land, who in this case was Mr. Hatcher. The Respondent was responsible for the movement only to the facility and not to the land owner ("pen" owner) or the person who brought the 18 wheeler truck there. Briefly summarized, and in the absence of any regulations setting forth what is permissible and what is not permissible, there is a situation here where the cattle were purchased for a distant purchaser's slaughterhouse by Mr. Hatcher through the Respondent and the Respondent hauled the four cows to Mr. Hatcher's facility for the sole purpose of loading them onto the 18 wheeler truck and he deposited them in an alley for that purpose. With respect to the practicalities of the situation, the Complainant's own witnesses pointed out that offloading may be needed not only to get the cattle on the truck but also because of the "28-hour" law which provides, among other things, that cattle cannot remain in transit for more than 28 hours without offloading for feed and water.

In its Reply Brief, Complainant maintains that reference to the "Twenty-Eight Hour Law" (45 U.S.C. sections 71-74) is irrelevant and immaterial to the issues herein. Moreover, Complainant states in Brief that such law does not apply to cattle hauled in trucks, but only to cattle to be moved in railcars and water vessels. The witnesses testifying made no such distinction. Complainant would distinguish unloading for humanitarian reasons and economic reasons.

Careful consideration has been accorded the Complainant's arguments and full accord is acknowledged with respect to the purposes to be achieved by the statutory enactment and the rules and regulations promulgated thereunder.

There is no disagreement with the underlying philosophy of the complainant that the Government and industry wish to achieve eradication of brucellosis, and that the regulations should be enacted and implemented to that end.

The United States Department of Agriculture has spent millions of dollars annually, over many years, to implement and administer the brucellosis eradication program. In order for the Department to successfully control and eradicate brucellosis, it must have the cooperation and compliance of the livestock industry, such as buyers, sellers and stockyard owners.

The Department is seeking a civil penalty of \$1,500.00 against respondent, Billy Van Norman. Title 21 of the United States Code, section 122, provides for assessment of civil penalties for the violation of regulations published pursuant to authority granted to the

Secretary of Agriculture in section 111 and 120 of Title 21 of the United States Code.

Title 21 of the United State Code, section 120, authorizes the Secretary of Agriculture to "issue regulations governing the interstate transportation of animals from any place where communicable disease exists or where he may have reason to believe it exists." *Penderson v. Benson*, 255 F.2d 524 at 529 (D.C. Cir. 1958). The Secretary has issued such regulations governing the interstate transportation of cattle from herds not known to be affected with brucellosis from what the Department has classified as Class C States. Mississippi has been designated as such a Class C State.

Title 9 of the Code of Federal Regulations, section 78.9(d)(iii), requires that such cattle originating in a Class C State and moving interstate other than for immediate slaughter directly to a recognized slaughtering establishment or directly to a quarantined feedlot may be moved interstate only if, under the circumstances of the movement in question, the cattle have two consecutive negative official tests for brucellosis at least 60 days apart and within 30 days prior to such interstate movement, and the cattle are accompanied interstate by a certificate and a "Permit for Entry." Section 71.18 of the regulations (9 CFR section 71.18), requires that cattle, over two years of age, be accompanied by an owner's or shipper's statement, or another document containing prescribed information.

Specifically, 9 CFR section 78.9(d)(1) seeks to accomplish a monitoring aspect by the United States Department of Agriculture by requiring that cattle moving from other than a farm of origin or nonquarantined feedlot, without, among other things, two brucellosis tests and various informational papers, move directly to a recognized slaughtering establishment. The Department of Agriculture in enforcing this regulation, has not in this case construed 9 CFR section 78.9(d)(1) to permit the movement in question.

However, the Respondent in this particular case did not violate any rule or regulation. There is no regulation covering the definition of what is direct movement. The Government witnesses indicated that they would now interpret direct movement to preclude the unloading and reloading of cattle such as happened in this particular case. Both the Respondent and Mr. Minter, on behalf of the Mississippi Livestock Association, indicated that a definite rule regulation is needed on this but that this is a prevalent practice in that part of the Country and, in their opinion, what occurred in this case was a direct movement of the cattle.

If there was a violation, and I don't believe that there was, the question of who violated this *interpretation* (of "direct" movement) would require a determination as to whether or not someone other

than Respondent was not the one who would be in violation inasmuch as all that the Respondent did was to haul the cattle from one place to another and then leave them in a walkway alley.

Mr. Pigott, Compliance Officer, must be presumed to be familiar with the customs and practices of the livestock industry in Mississippi, and supposedly would have known Respondent would not be hauling such a small load in excess of 400 miles to Palestine, Texas. Respondent indicated when he was stopped that he was hauling the cattle to Hatcher's (Tr. 27). Mr. Pigott's and his staff's determination was premised on it appearing, "* * * that by those cattle putting into the holding pen at Hatcher's Farm that that constituted a violation." (Tr. 32, 33). Mr. Pigott has never seen what was described as "holding pens." (Tr. 53). Neither he nor Dr. Garnett had seen Hatcher Dairy Farm's facilities.

Mr. Pigott's testimony illustrated instances where cattle could be offloaded unto an unloading dock. (Tr. 44, 45, 49). With respect to loading directly from a "gooseneck" onto a "double-deck," using some sort of ramp, Mr. Pigott indicated, "That would be an impossibility * * *" (Tr. 48). However, he would approve of walking animals off one truck down a ramp and walking them up a ramp to another truck. (Tr. 51). That is what the persuasive evidence shows happened here.

Further, Mr. Pigott acknowledged:

"* * * And in certain instances where it's necessary that these smaller trucks load to the larger, we have tried to be reasonable and allow that movement to be made * * * " (Tr. 58).

This case should not be regarded as "approving" the "gooseneck" to "18 wheeler" procedure and it certainly serves notice to Respondent that such procedure, as was used here, in the future, will not be interpreted and construed as "direct" movement. However, the Department has within its authority the capacity to *issue and publish* rules and regulations, which would preclude much of the subjectiveness present when both sides seek to establish what is 'reasonable.'

The most that the Complainant has proven is that there has been no regulation which the Respondent has violated, only its resent interpretation; that this is a widespread practice in Mississippi (and possibly other areas); that the determination of what is direct movement, is a matter of interpretation; and, there are varying interpretations as to what is direct movement. The Complainant is seeking to establish an interpretation which is a change from the interpretation which has been applied in the past, and

which has allowed the movement of cattle such as was present here.

Respondent argues that because, in its estimation, the manner in which the four cows were moved is reasonable and in accordance with the custom of the trade, it, too, must be accepted as a legitimate movement under section 78.9(d)(1). Complainant states that this argument goes too far, and cites, *Lucas Coal Company, et al. v. Interior Board of Mine Operations Appeal, et al.*, 522 F.2d 581, 584 (C.A. 3rd Cir. 1975), where the court held that an "[a]gency's explanation of its own regulation, if reasonable . . . is controlling despite existence of other interpretations that might seem even more reasonable. Also cited is *Expedient Services, Inc. v. Weaver*, 614 F.2d 56, 57, fn. 1 (C.A. 5th Cir. 1980). Furthermore, the Complainant contends that the Respondent's contention forces upon the Department, which has the broader perspective and experience in eradicating this disease, a practice which is beneficial to but one segment of the nation's livestock owners, the livestock haulers in the State of Mississippi.

It is a common practice in the industry for a number of the smaller "gooseneck" trailers to converge at one spot, and for the cattle there to be loaded onto a larger vehicle for transport to the actual destination. Just such a routine practice was followed in this case. When Respondent arrived at the Hatcher Dairy Farm Kentwood, an 18 wheeler "double-deck" truck awaited at the chute normally used by such trucks. Obviously, the Respondent was entitled to believe this truck to be the truck in which the cattle in question were to be loaded for delivery to Texas, and in fact, it apparently was. The Respondent unloaded the cattle in question in the alley walkway between pens at the Hatcher's facility.

Barns such as Hatcher's have alleys, which are walkways between pens, and pens, which are four walled enclosures with gates. To get from the "gooseneck" chute unto the "double-deck" truck, the cattle simply had to be guided into the alley, around a turn and onto a ramp to the "double-deck." Of course, the alley could not be used to hold cattle for any period because this would interfere with the movement of other cattle in the alley.

The Respondent did not place any cattle in pens, rather he placed the cows in the alley and immediately left the premises after being paid \$35.00 for his hauling fee. As the undisputed evidence shows, a "double-deck" truck was waiting at the Barn, so Respondent clearly was justified in believing that the four cattle were about to be loaded for transport to Palestine. This was especially so since there were personnel in the alley who could load the cattle which clearly was not Respondent's job.

The Respondent had every reason to believe that the cattle in question were to be loaded presently onto a truck for transport to Texas. For all he knew the cattle would hardly stop walking on their way through the alley walkway to the other vehicle. This is significant because obviously the responsibility for seeing that the cattle continued in their "direct" movement would pass to others, after the Respondent parted with the cattle.

On Brief, Complainant suggests several ways direct movement can be accomplished and approved. However, some of these suggestions are not bottomed by careful study, revealed in this hearing record, and some of the witnesses have indicated such alternative methods are not feasible and practical.

For instance, Complainant suggests that in order for this movement to have been directly to a recognized slaughtering establishment, the transfer to another truck would have had to have been accomplished in one of three manners: Firstly, the truck carrying the cows could have backed up to another truck where the cows could have been transferred to the second truck, and a loading ramp could be utilized where the cows could be unloaded and made to walk up the ramp to the decks of the second truck; Secondly, the cows could have been held at the Sale Barn in Mississippi, and a truck could have picked them up on its way to the other recognized slaughtering establishment and that under this alternative, although the movement did not go directly to a recognized slaughtering establishment after leaving the Sale Barn, the program makes allowances for cows to be picked up at other markets along the way to the slaughtering establishment so long as no animal, once picked up, was unloaded until the truck reached the recognized slaughtering establishment; and, finally, it is said the transfer from one truck to another truck could have been accomplished by unloading the cows into pens at an approved facility, such as a quarantined feedlot.

The Complainant argues that its interpretation of the regulations as to what is direct movement should be adopted because of the large amount of money, and effort, which the Department of Agriculture has expended with respect to the eradication of brucellosis. However, this interpretation, including the alternatives set forth above, which is presently being urged by the Complainant, is not set forth in the regulations themselves. Also, there is persuasive testimony of record, that the practice engaged in by the Respondent was an accepted and widespread practice in the State of Mississippi. To the extent the presently urged subjective interpretation, or, the alternative methods which are indicated, on Brief,

are set forth in published and known regulations and rules, they, of course, should be adhered to and complied with.

It was brought out through testimony that there is nothing in the regulations which specifically prohibit loading and unloading of cattle when they are involved in a shipment to slaughter. A general consensus of opinion of the witnesses was that the person who was the owner of the land, or, the person in charge of the large truck was responsible for what happened to the animals after they were unloaded from the "gooseneck."

In the absence of any clear violation of the regulations in question, and recognizing that the Government has the burden of proof, it would be unjust to say that this Respondent violated the regulations which can, and have been, interpreted differently than that now put forth by the Complainant. Moreover, the regulations are silent as to what constitutes direct movement. Based on a consideration of the record as a whole, including weighty credence given to the testimony of Respondent and Mr. Minter, it is concluded that the Government has not borne its burden of proof in establishing a violation.

The many other arguments, contentions, and requests of the parties have been considered carefully. To the extent not ruled upon and to the extent, if any, they may be inconsistent with this Decision and Order, they are hereby denied.

ORDER

The Complaint filed herein on February 24, 1984, is hereby dismissed with prejudice.

This Decision and Order shall take effect 35 days after service thereof, unless appealed to the Secretary's Judicial Officer within 30 days as set forth in the Rules of Practice and Procedure, 7 CFR 1.130, *et seq.*

[The Decision and Order became final on March 17, 1986.—Ed.]

In re: ELMO MAYES and MELVIN CHEATWOOD, A.Q. Docket No. 208.
Decided January 31, 1986.

Victor W Palmer, Administrative Law Judge

Frondu Woods, for complainant.

For respondent, pro se

DECISION AND ORDER MELVIN CHEATWOOD

PRELIMINARY STATEMENT

This proceeding was instituted under the Act of February 2, 1903, as amended (21 U.S.C. §§ 111 and 120), by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. This complaint alleged that the respondents violated section 78.9(c)(3)(ii) of the regulations promulgated thereunder (9 CFR § 78.9(c)(3)(ii)). Copies of the complaint and the Rules of Practice governing proceedings under the Act were served by the Hearing Clerk, by certified mail, upon respondent Melvin Cheatwood.

Pursuant to section 1.136 of the Rules of Practice (7 CFR § 1.136) applicable to this proceeding, respondent Melvin Cheatwood was informed in the complaint and the letter of service that an answer should be filed within twenty days after service of the complaint, and that failure to file an answer would constitute a waiver of hearing, as provided in section 1.139 of the Rules of Practice (7 CFR § 1.139).

Respondent Melvin Cheatwood filed no answer during the twenty-day period allowed. Respondent's failure to file an answer within the time provided constitutes an admission of the allegations in the complaint, under section 1.136(c) of the Rules of Practice (7 CFR § 1.136(c)). Respondent's failure to file an answer also constitutes a waiver of hearing under section 1.139 of the Rules of Practice (7 CFR § 1.139). Since respondent Melvin Cheatwood is deemed to have admitted the material allegations of fact in the complaint, they are adopted and set forth as the Findings of Fact.

FINDINGS OF FACT

1. Melvin Cheatwood, respondent, is an individual whose business address is Rackley-Madding Trucking Company, 6517 S.W. 57th Street, Oklahoma City, Oklahoma 73179.

2. On or about March 3, 1985, respondent Melvin Cheatwood moved 102 cattle from Cumberland Gap, Tennessee, a Class B State, to Oklahoma City, Oklahoma. Five of the cattle were moved in violation of 9 CFR § 78.9(c)(3)(ii), because they were not accompanied by a certificate, as required.

CONCLUSIONS

Respondent Melvin Cheatwood has failed to file an answer to any of the allegations in the complaint. The consequences of such a failure were explained to Mr. Cheatwood in the complaint and in the letter of service that accompanied it. By his silence respondent Melvin Cheatwood has admitted all of the material allegations of fact in the complaint and has waived a hearing.

By reason of the Findings of Fact set forth above, respondent Melvin Cheatwood has violated the Act and regulations promulgated thereunder. The following order is therefore issued.

ORDER

Respondent Melvin Cheatwood is hereby assessed a civil penalty of one thousand dollars (\$1000), which shall be payable to the "Treasurer of the United States" by certified check or money order, and which shall be forwarded to Fronda C. Woods, Office of the General Counsel, Room 2422, South Building, United States Department of Agriculture, Washington, D.C. 20250-1400, within thirty (30) days from the effective date of this order.

This order shall have the same force and effect as if entered after full hearing and shall be final and effective 35 days after service of this Decision and Order upon respondent Melvin Cheatwood, unless there is an appeal to the Judicial Officer pursuant to section 1.145 of the Rules of Practice applicable to this proceeding (7 CFR # 1.145).

[The Decision and Order for Melvin Cheatwood became final on March 17, 1986.—Ed.]

In re: ELMO MAYES and MELVIN CHEATWOOD, A.Q. Docket No. 208.
Decided January 31, 1986.

Victor W. Palmer, Administrative Law Judge.
Frona Woods, for complainant.
For respondent, pro se.

DEFAULT DECISION AND ORDER FOR ELMO MAYES

PRELIMINARY STATEMENT

This proceeding was instituted under the Act of February 2, 1903, as amended (21 U.S.C. §§ 111 and 120), by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. This complaint al-

leged that the respondents violated section 78.9(c)(3)(ii) of the regulations promulgated thereunder (9 CFR § 78.9(c)(3)(ii)).

The Office of the Hearing Clerk mailed to respondent Elmo Mayes, by certified mail, copies of the complaint and the Rules of Practice governing proceedings under the Act. Mr. Mayes refused to accept delivery, and the documents were returned to the Hearing Clerk undelivered. The Hearing Clerk then remailed the documents by regular mail. This constitutes service under section 1.147(b)(3) of the Rules of Practice applicable to this proceeding (7 CFR § 1.147(b)(3)).

Pursuant to section 1.136 of the Rules of Practice (7 CFR § 1.136), respondent Elmo Mayes was informed in the complaint and the letter of service that an answer should be filed within twenty days after service of the complaint, and that failure to file an answer would constitute a waiver of hearing, as provided in section 1.139 of the Rules of Practice (7 CFR § 1.139).

Respondent Elmo Mayes filed no answer during the twenty-day period allowed. Respondent's failure to file an answer within the time provided constitutes an admission of the allegations in the complaint, under section 1.136(c) of the Rules of Practice (7 CFR § 1.136(c)). Respondent's failure to file an answer also constitutes a waiver of hearing under section 1.139 of the Rules of Practice (7 CFR § 1.139). Since respondent Elmo Mayes is deemed to have admitted the material allegations of fact in the complaint, they are adopted and set forth as the Findings of Fact.

FINDINGS OF FACT

1. Elmo Mayes, respondent, is an individual whose address is Route 1, Cumberland Gap, Tennessee 37724.

2. On or about March 3, 1985, respondent Elmo Mayes moved 102 cattle from Cumberland Gap, Tennessee, a Class B State, to Oklahoma City, Oklahoma. Five of the cattle were moved in violation of 9 CFR § 78.9(c)(3)(ii), because they were not accompanied by a certificate, as required.

CONCLUSIONS

Respondent Elmo Mayes has failed to file an answer to any of the allegations in the complaint. The consequences of such a failure were explained to Mr. Mayes in the complaint and in the letter of service that accompanied it. By his silence respondent Elmo Mayes has admitted all of the material allegations of fact in the complaint and has waived a hearing.

By reason of the Findings of Fact set forth above, respondent Elmo Mayes has violated the Act and regulations promulgated thereunder. The following order is therefore issued.

ORDER

Respondent Elmo Mayes is hereby assessed a civil penalty of two thousand dollars (\$2000), which shall be payable to the "Treasurer of the United States" by certified check or money order, and which shall be forwarded to Fronda C. Woods, Office of the General Counsel, Room 2422, South Building, United States Department of Agriculture, Washington, D.C. 20250-1400, within thirty (30) days from the effective date of this order.

This order shall have the same force and effect as if entered after full hearing and shall be final and effective 35 days after service of this Decision and Order upon respondent Elmo Mayes, unless there is an appeal to the Judicial Officer pursuant to section 1.145 of the Rules of Practice applicable to this proceeding (7 CFR § 1.145).

[The Default Decision and Order for Elmo Mayes became final on March 20, 1986.—Ed.]

In re: WAYLAND LIVESTOCK AUCTION, INC., and JOHN TIEMEYER,
A.Q. Docket No. 238. Decided March 24, 1986.

Dorothea A. Baker, Administrative Law Judge.

Jaru Ruley, for complainant.

James A. Jeske, III, Grand Haven, Michigan, for respondent.

CONSENT DECISION AS TO WAYLAND LIVESTOCK AUCTION INC.

This proceeding was instituted under the Act of February 2, 1903, as amended (Act) (21 U.S.C. §§ 111 and 120), by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service alleging that Wayland Livestock Auction, Inc., respondent, violated the Act and regulations promulgated thereunder (9 CFR § 78.1 *et seq.*). The parties have agreed that this proceeding should be terminated by entry of the Consent Decision set forth below and have agreed to the following stipulations:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, respondent, Wayland Livestock Auction, Inc., specifically admits that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining allegations in the complaint, admits to the Findings of Fact set forth below, and waives:

(a) any further procedure;

(b) any requirement that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law, or discretion, as well as the reasons or bases thereof;

(c) all rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. Respondent, Wayland Livestock Auction, Inc., also waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by the respondent in connection with this proceeding.

FINDINGS OF FACT

1. Wayland Livestock Auction, Inc., respondent, is a corporation incorporated under the laws of the State of Michigan and having its principal place of business at 3634 N. Main Street, Wayland, Michigan 49345.

2. On or about February 5, 1985, the respondent moved at least nine cattle interstate from livestock markets in Goshen and Topeka, Indiana, to the premises of John Tiemeyer, Caledonia, Michigan.

3. On or about February 12, 1985, the respondent moved at least eight cattle interstate from livestock markets in Goshen and Topeka, Indiana, to the premises of John Tiemeyer, Caledonia, Michigan.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and having agreed to the provisions set forth in the following order in disposition of this proceeding with respect to respondent Wayland Livestock Auction, Inc., such order and decision will be issued.

ORDER

The respondent is assessed a civil penalty of five hundred dollars (\$500.00). The respondent shall make payment by sending a certified check or money order payable to the "Treasurer of the United States," to Jaru Ruley, Office of the General Counsel, Room 2422, South Building, United States Department of Agriculture, Washington, D. C. 20250-1400, within thirty (30) days from the effective date of this order.

This order shall become effective on the day upon which service of this order is made upon the respondent.

In re: WAYLAND LIVESTOCK AUCTION, INC., and JOHN TIEMEYER,
A.Q. Docket No. 238. Decided March 24, 1986.

Morthea A Baker, Administrative Law Judge.
Baru Ruley, for complainant
James Jeske, III, Grand Haven, Michigan, for respondent.

CONSENT DECISION AS TO JOHN TIEMEYER

This proceeding was instituted under the Act of February 2, 1903, as amended (Act) (21 U.S.C. §§ 111 and 120), by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service alleging that John Tiemeyer, respondent, violated the Act and regulations promulgated thereunder (9 CFR § 78.1 *et seq.*). The parties have agreed that this proceeding should be terminated by entry of the Consent Decision set forth below and have agreed to the following stipulations:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, respondent, John Tiemeyer, specifically admits that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining allegations in the complaint, admits to the Findings of Fact set forth below, and waives:

- (a) any further procedure;
- (b) any requirement that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law, or discretion, as well as the reasons or bases thereof;
- (c) all rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. Respondent, John Tiemeyer, also waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by the respondent in connection with this proceeding.

FINDINGS OF FACT

1. John Tiemeyer, respondent, is an individual whose mailing address is 8005 Breton Road, Route 1, Caledonia, Michigan 49316.

2. On or about February 12, 1985, the respondent moved at least eight cattle interstate from livestock markets in Goshen and Topeka, Indiana, to the premises of John Tiemeyer, Caledonia, Michigan.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and having agreed to the provisions set forth in the following Order in

disposition of this proceeding with respect to respondent John Tie-
meyer, such order and decision will be issued.

ORDER

The respondent is assessed a civil penalty of two hundred fifty dollars (\$250.00). The respondent shall make payment by sending a certified check or money order payable to the "Treasurer of the United States," to Jaru Ruley, Office of the General Counsel, Room 2422, South Building, United States Department of Agriculture, Washington, D. C. 20250-1400, within thirty (30) days from the effective date of this order.

This order shall become effective on the day upon which service of this order is made upon the respondent.

In re: KENNETH BURDETTE and JAMES BURDETTE, A.Q. Docket No. 167. Decided January 27, 1986.

Victor W Palmer, Administrative Law Judge.

Kris Ikejiri, for complainant.

For respondent, pro se.

DECISION AND ORDER

PRELIMINARY STATEMENT

This proceeding was instituted by a complaint by the Administrator, Animal and Plant Health Inspection Service, which alleged that Kenneth Burdette and James Burdette violated the Act of February 2, 1903, as amended, (21 U.S.C. § 111 and § 120), and the regulations thereunder (9 C.F.R. § 71.1 *et seq* and § 78.1 *et seq.*), by moving cattle interstate without the documents required for the control of brucellosis, an infectious and communicable disease of cattle. An answer was thereafter filed on behalf of both respondents on June 10, 1985 by Kent O. Hyde, a member of the Missouri bar.

On October 21, 1985, an oral hearing was scheduled to take place Springfield, Missouri, on November 19, 1985. Pursuant to a request by respondents' counsel for an alternative hearing date due to a conflict in his schedule, a Notice of Rescheduled Hearing was issued on November 1, 1985, scheduling the hearing to begin on January 22, 1986, in the Green County Courthouse Annex, 833 Conville, Springfield, Missouri.

The oral hearing was thereafter held as scheduled on January 22, 1986. Mr. Kent O. Hyde, the attorney for both respondents, ap-

peared at that time and presented a consent decree on behalf of respondent Kenneth Burdette, which was accepted for filing and issued on that day. Mr. Hyde advised that he had notified Mr. James Burdette by letter of the scheduled hearing date, but that James Burdette was not present and Mr. Hyde was unable to secure his presence. Mr. Hyde moved that his appearance as counsel be withdrawn. That motion was granted and the hearing was thereafter held as scheduled.

On the basis of the testimony that was transcribed that day and the exhibits that were received, the following findings and conclusions are herewith being entered.

Mr. James Burdette is being assessed the maximum civil penalty of \$3,000 for the three violations of the Act of February 2, 1903, as amended, which were proved by the evidence of record.

FINDINGS OF FACT

1. James Burdette, respondent, is an individual whose last known address is Route 1, Pleasant Hope, Missouri 65725.

2. Brucellosis is an infectious, contagious, and communicable disease of cattle, which also affects humans and is known in humans as undulant fever.

3. The regulations in Title 9, Code of Federal Regulations, Part 71.1 *et seq.*, and part 78.1 *et seq.*, are an integral and significant part of the Federal-State cooperative efforts to control and eradicate brucellosis.

4. The cattle identified below as 43 BE 3343, 43 BE 3422, 43 BE 3520, and 43 BE 3344 were non-vaccinates, 2 years of age or over.

5. The cattle identified below as 43 BE 3390 was a calfhood vaccine, 2 years of age or over.

6. On or about July 11, 1984, the respondent moved interstate from Missouri to Texas, at least five cattle, identified as 43 BE 3343, 43 BE 3422, 43 BE 3520, 43 BE 3344, and 43 BE 3390, in violation of section 71.18 of the regulations (9 CFR § 71.18), because a statement signed by the owner or shipper of the cattle, or other document, did not accompany the cattle, as required.

7. On or about July 11, 1984, the respondent moved interstate from Missouri to Texas, at least five cattle, identified as 43 BE 3343, 43 BE 3422, 43 BE 3520, 43 BE 3344, and 43 BE 3390, in violation of section 78.9(c) of the regulations (9 CFR § 78.9(c)), because the cattle were not accompanied by a certificate, as required.

8. On or about July 11, 1984, the respondent moved interstate from Missouri to Texas, at least five cattle, identified as 43 BE 3343, 43 BE 3422, 43 BE 3520, 43 BE 3344, and 43 BE 3390, in violation of section 78.9(c) of the regulations (9 CFR § 78.9(c)) because

the cattle were not accompanied by a "Permit for Entry", as required.

9. The July 11, 1984 violations were detected during an inspection of a truck driven by respondent which contained over 40 cattle. When confronted by the government inspector, respondent James Burdette, gave false and misleading information respecting his movement of the cattle and the reasons why he did not have the required documents.

CONCLUSIONS

On July 11, 1984, respondent James Burdette committed three separate violations of the Act of February 2, 1903, as amended, (2 U.S.C. § 111 and § 120) and the regulations thereunder (9 C.F.R. § 78.9(c)), for which he should be assessed the maximum civil penalty of \$1,000 per violation or \$3,000 total.

ORDER

Respondent James Burdette is assessed a civil penalty of \$3,000 (three thousand dollars), which shall be made payable to the "Treasurer of the United States" by certified check or money order, and it shall be forwarded to Kris H. Ikejiri, Office of the General Counsel, Room 2422-South Building, U.S. Department of Agriculture, Washington, D. C. 20250, within thirty (30) days from the effective date of this Decision and Order. This Order shall take effect on the 11th day after this Decision becomes final.

Pursuant to the Rules of Practice governing proceedings under the Act, this Decision shall become final without further proceedings thirty-five (35) days after service hereof, unless appealed to the Secretary by a party to the proceedings within thirty (30) days after service pursuant to sections 1.139 and 1.145 of the Rules of Practice (7 CFR 1.139).

Copies hereof shall be served upon the parties.

[The Decision and Order became final on April 4, 1986.—Ed.]

state from East Feliciana Parish, Louisiana, to Centreville, Mississippi.

CONCLUSIONS

The respondents having admitted the jurisdictional facts and having agreed to the provisions set forth in the following Order in disposition of this proceeding, such Decision and Order will be issued.

ORDER

1. The Respondent, James Johnson, is assessed a civil penalty of one hundred dollars (\$100.00) which shall be payable to the "Treasurer of the United States" by certified check or money order, and shall be forwarded to Sherrie Kopka Kennedy, Office of the General Counsel, Room 2422 South Bldg., United States Department of Agriculture, Washington, D. C. 20250-1400, within thirty (30) days from the effective date of this order.

2. The Respondent, Frank Haynes, is assessed a civil penalty of one hundred dollars (\$100.00) which shall be payable to the "Treasurer of the United States" by certified check or money order, and shall be forwarded to Sherrie Kopka Kennedy, Office of the General Counsel, Room 2422 South Bldg., United States Department of Agriculture, Washington, D.C., 20250-1400, within thirty (30) days from the effective date of this order.

3. This order shall become effective on the day upon which service of this Order is made upon the Respondents.

In re: FORREST BURNHAM D.V.M., A.Q. Docket No. 179. Decided April 9, 1986.

John A. Campbell, Administrative Law Judge

Jaru Ruley, for complainant.

For respondent, pro se.

CONSENT DECISION

This proceeding was instituted under the Act of February 2, 1903, as amended (Act) (21 U.S.C. §§ 111 and 120) by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service alleging that Forrest Burnham, D.V.M., respondent, violated the Act and regulations promulgated thereunder (9 CFR § 71.18. The parties have agreed that this proceeding should be terminated by entry of the Consent Decision set forth below and have agreed to the following stipulations:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, respondent specifically admits that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining allegations in the complaint, admits to the Findings of Fact set forth below, and waives:

(a) Any further procedure;

(b) Any requirement that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law, or discretion, as well as the reasons or bases thereof;

(c) All rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. Respondent also waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by the respondent in connection with this proceeding.

FINDINGS OF FACT

1. Forrest Burnham, D.V.M, respondent, is an individual whose mailing address is P. O. Box 702, McKinney, Texas 75069.

2. On or about March 2, 1984, the respondent caused the interstate movement of one cow, which was two years of age or over, from McKinney, Texas, to Pueblo, Colorado.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and having agreed to the provisions set forth in the following order in disposition of this proceeding, such order and decision will be issued.

ORDER

The respondent is assessed a civil penalty of three hundred dollars (\$300.00). The respondent shall send a certified check or money order for \$300.00 payable to the "Treasurer of the United States," to Jaru Ruley, Office of the General Counsel, Room 2422, South Building, United States Department of Agriculture, Washington, D. C. 20250-1400, within thirty (30) days from the effective date of this order.

This order shall become effective on the day upon which service of this order is made upon the respondent.

In re: JOHN FALEN, A.Q. Docket No. 193. Decided April 11, 1986.

John A. Campbell, Administrative Law Judge.

Joseph Pembroke, for complainant.

For respondent, pro se.

CONSENT DECISION

This proceeding was instituted under the Act of February 2, 1903, as amended, (Act) (21 U.S.C. §§ 111, 120 and 122) by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service alleging that John Falen, respondent violated the Act and regulations promulgated thereunder (9 CFR § 78.1 *et seq.*). The parties have agreed that this proceeding should be terminated by entry of the Consent Decision set forth below and have agreed to the following stipulations:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, respondent specifically admits that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining allegations in the complaint, admits to the Findings of Fact set forth below, and waives:

(a) any further procedure;

(b) any requirements that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law or discretion, as well as the reasons or bases thereof;

(c) all rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. Respondent also stipulates and agrees that the United States Department of Agriculture is the "prevailing party" in the proceeding and waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by the respondent in connection with this proceeding.

FINDINGS OF FACT

1. John Falen, is an individual whose mailing address is Box 132, Orovada, Nevada 89512.

2. On or about December 2, 1984, respondent shipped interstate 179 adult cattle from OK Livestock Exchange, Caldwell, Idaho to Orovada, Nevada.

3. On or about December 14, 1984, respondent shipped interstate 140 adult cattle from Orovada, Nevada to Fort Morgan, Colorado.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and having agreed to the provisions set forth in the following order in disposition of the proceeding, such order and decision will be issued.

ORDER

The respondents is assessed a civil penalty of five hundred dollars (\$500) which shall be payed in five equal monthly installment of one hundred dollars each. Payment shall be to the "Treasurer of the United States" by certified check or money order, and shall be forwarded to Joseph P. Pembroke, Office of the General Counsel, Room 2422, South Building, United States Department of Agriculture, Washington, D. C. 20250-1400, within thirty (30) days from the effective date of this order.

This order shall become effective on the day this order is served upon the respondent.

In re: AGOSTINHO CAMARA, A.Q. Docket No. 213. Decided February 28, 1986.

William Weber, Administrative Law Judge.

Sherrie Kennedy, for complainant.

For respondent, *pro se*

DEFAULT DECISION AND ORDER

PRELIMINARY STATEMENT

This proceeding was instituted under the Swine Health Protection Act (Act) (7 U.S.C. § 3801 *et seq.*), by a Complaint issued by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. The Complaint was filed with the Hearing Clerk on October 18, 1985. The Complaint alleged that Respondent violated section 4 of the Act (7 U.S.C. § 3803) and section 166.2 of the regulations promulgated thereunder (9 CFR § 166.2).

Copies of the complaint and the Rules of Practice governing proceedings under the Act were served by the Hearing Clerk, by certified mail, upon respondent on October 28, 1985.

Pursuant to section 1.136 of the Rules of Practice (7 CFR § 1.136) applicable to this proceeding, Respondent was informed in the Complaint and the letter of service that an Answer should be filed with the Hearing Clerk within twenty (20) days after service of the

Complaint, and that failure to file an answer either denying or otherwise responding to the allegations in the Complaint and requesting an oral hearing would constitute an admission of such allegations and a waiver of such hearing. On November 21, 1985, Respondent was sent, by regular mail, a notice that his Answer had not been received by the Hearing Clerk in the allotted time. More than twenty (20) days have elapsed since Respondent was served with the Complaint in question. Respondent has not filed an answer to date. This Decision and Order, therefore, is issued pursuant to sections 1.136 and 1.139 of the Rules of Practice applicable to this proceeding (7 CFR §§ 1.136 and 1.139).

Accordingly, the material facts alleged in the Complaint, which are admitted by Respondent's failure to file an Answer, are adopted and set forth herein as the findings of fact.

FINDINGS OF FACT

1. Agostinho Camara, respondent, is an individual whose address is 105 George Street, Fall River, Massachusetts 02720

2. On or about December 12, 1984, the respondent fed garbage to swine, in violation of section 4 of the Act (7 U.S.C. § 3803) and section 166.2 of the regulations (9 CFR § 166.2), because the garbage was not treated, as required.

3. On or about February 4, 1985, the respondent fed garbage to swine, in violation of section 4 of the Act (7 U.S.C. § 3803) and section 166.2 of the regulations (9 CFR § 166.2), because the garbage was not treated, as required.

4. On or about February 7, 1985, the respondent fed garbage to swine, in violation of section 4 of the Act (7 U.S.C. § 3803) and section 166.2 of the regulations (9 CFR § 166.2), because the garbage was not treated, as required.

CONCLUSION

By reason of the facts in the findings of fact set forth above, Respondent has violated the Act and regulations promulgated thereunder. Therefore, the following Order is issued.

ORDER

Respondent is assessed a civil penalty of one thousand five hundred dollars [\$1,500] (\$500.00 per violation) which shall be paid within thirty (30) days from the date this Order becomes effective. This civil penalty shall be made payable to "Treasurer of the United States," by certified check or money order, and shall be forwarded to Sherrie Kopka Kennedy, U.S. Department of Agricul-

ture, Office of the General Counsel, Room 2422 South Building, Washington, D. C. 20250-1400.

This Order shall have the same force and effect as if entered after full hearing and shall be final and effective 35 days after service of this Decision and Order upon Respondent, unless there is an appeal to the Judicial Officer within 30 days of service pursuant to section 1.145 of the Rules of Practice applicable to this proceeding (7 CFR § 1.145).

[The Default Decision and Order became final on April 14, 1986.—Ed.]

In re: BUCK HUMMER d/b/a BUCK HUMMER TRUCKING and SWIFT INDEPENDENT PACKING Co., A.Q. Docket No. 240. Decided April 21, 1986.

Victor W. Palmer, Administrative Law Judge.

Clement McGovern, for complainant

Collins P. Whitfield, Chicago, Illinois, for respondents.

CONSENT DECISION AND ORDER

This proceeding was instituted under the Act of February 2, 1903, as amended (Act) (21 U.S.C. Section 111 and Section 120), by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service alleging that the respondents violated the Act and regulations promulgated thereunder (9 CFR Section 71.1 *et seq.*).

Respondents have agreed that this proceeding should be terminated by entry of the Consent Decision set forth and have agreed to the following stipulations:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, respondents admit specifically that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admit nor deny the remaining allegations in the complaint, admit to the Findings of Fact set forth below, and waive:

(a) Any further procedure;

(b) Any requirement that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law, or discretion, as well as the reasons or bases thereof;

(c) All rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. Respondents also waive any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. Section 504 *et seq.*) for fees and other expenses incurred by him in connection with this proceeding.

FINDINGS OF FACT

1. Buck Hummer d/b/a Buck Hummer Trucking, herein referred to as the respondent, is an individual whose address is Box 196, Oxford, Iowa 52322.

2. Swift Independent Packing Co., herein referred to as the respondent, is a corporation incorporated under the laws of the State of Delaware and qualified to do business in Iowa, and whose agent for service is CT Corporation Systems, 2222 Grand Avenue, Des Moines, Iowa 50312.

3. On or about May 13, 1985, the respondents moved seventy-two (72) cattle interstate from Rock Island, Illinois, to Des Moines, Iowa.

CONCLUSIONS

Respondents having admitted the jurisdictional facts and having agreed to the provisions set forth in the following Order in disposition of this proceeding, such Order and Decision will be issued.

ORDER

Respondents are assessed a civil penalty of seven hundred and fifty dollars (\$750.00) which shall be payable to the "Treasurer of the United States," by certified check or money order, and which shall be forwarded to Clement J. McGovern, Office of the General Counsel, Room 2422 South Building, United States Department of Agriculture, Washington, D. C. 20250-1400, within thirty (30) days from the effective date of this Decision and Order.

This Decision and Order shall become effective on the day upon which service of this order is made upon the respondent.

In re: KING LIVESTOCK COMPANY, INC., NORTHWEST ALABAMA LIVESTOCK AUCTION, CARL "DICKIE" GUIER, and TRENTON GRAIN COMPANY. A.Q. Docket No. 197. Decided April 22, 1986.

Victor W Palmer, Administrative Law Judge
Jaru Ruley, for complainant
For respondents, pro se

CONSENT DECISION AS TO TRENTON GRAIN COMPANY

This proceeding was instituted under the Act of February 2, 1903, as amended, (Act) (21 U.S.C. §§ 111 and 120) by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service alleging that Trenton Grain Company, respondent, violated the Act and regulations promulgated thereunder (9 CFR § 78.1 *et seq.*). The parties have agreed that this proceeding should be terminated by entry of the Consent Decision set forth below and have agreed to the following stipulations:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, respondent, Trenton Grain Company, specifically admits that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining allegations in the complaint, admits to the Findings of Fact set forth below, and waives:

(a) any further procedure;

(b) any requirements that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law or discretion, as well as the reasons or bases thereof;

(c) all rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. Respondent, Trenton Grain Company, also waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by the respondent in connection with the proceeding.

FINDINGS OF FACT

1. Trenton Grain Company, respondent, is a business having its principal place of business at E. First Street, Hopkinsville, Kentucky 42250.

2. On or about September 11, 1984, the respondent moved interstate a number of cattle from Russellville and Florence, Alabama, to Hopkinsville, Kentucky.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and having agreed to the provisions set forth in the following Order in disposition of this proceeding, such order and decision will be issued.

ORDER

The respondent is assessed a civil penalty of six hundred dollars (\$600.00). The respondent shall make payment by sending a certified check or money order payable to the "Treasurer of the United States," to Jaru Ruley, Office of the General Counsel, Room 2422, South Building, United States Department of Agriculture, Washington, D. C. 20250-1400, within thirty (30) days from the effective date of this order.

This order shall become effective on the day upon which service of this order is made upon respondent.

In re: GARY KEEN, A.Q. Docket No. 214. Decided April 25, 1986.

Dorothea A. Baker, Administrative Law Judge
Frona Woods, for complainant
Joe Ellis, Cassville, MO, for respondent

CONSENT DECISION

On October 30, 1985, this proceeding was instituted under the Act of February 2, 1903, as amended (Act) (21 U.S.C. §§ 111 and 120), by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service. The complaint alleged that the respondent violated the Act and regulations promulgated thereunder (9 CFR § 78.1 *et seq.*). The parties have agreed that this proceeding should be terminated by entry of the Consent Decision set forth below and have agreed to the following stipulations:

1 For the purposes of this stipulation and the provisions of this Consent Decision only, respondent specifically admits that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining allegations in the complaint, admits to the Findings of Fact set forth below, and waives:

- (a) any further procedure;
- (b) any requirements that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law or discretion, as well as the reasons or bases thereof;

(c) all rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. Respondent also stipulates and agrees that the United States Department of Agriculture is the "prevailing party" in the proceeding and waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980, as amended (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by the respondent in connection with this proceeding.

FINDINGS OF FACT

1. Gary Keen, respondent, is an individual whose address is Box 413, Cassville, Missouri 65625.

2. On or about January 4, 1985, respondent moved four cows from Cassville, Missouri, to Brush, Colorado. The cows had eartag identification numbers 43VZB3506, 43VZB3510, 43VZB3517, and 43VZB3521, and were accompanied by Missouri Official Health Certificate No. 490518.

CONCLUSIONS

The respondent has admitted the jurisdictional facts and has agreed to the provisions set forth in the following order in disposition of the proceeding. Therefore, such order will be issued.

ORDER

Respondent Gary Keen is assessed a civil penalty of five hundred dollars (\$500) which shall be payable to the "Treasurer of the United States" by certified check or money order, and which shall be forwarded to Fronda C. Woods, Office of the General Counsel, Room 2422-South Building, United States Department of Agriculture, Washington, D. C. 20250-1400, within thirty (30) days from the effective date of this order.

This order shall become effective on the day this order is served upon the respondent.

In re: ROSIA LEE ENNES. AWA Docket No. 269. Decided March 3, 1986.

Sale of animals without obtaining dealer license—Penalty

The Judicial Officer reversed Judge Baker's order, which assessed a suspended \$200 civil penalty against respondent for selling dogs in commerce without a license. The Judicial Officer assessed a penalty of \$1,000. Civil penalties under the Act must be based on the size of the business, gravity of the violation, the person's good faith, and previous violations. Operating without a license strikes at the heart of the regulatory program. A moderate-sized facility is assessed a more modest penalty than a large-sized facility. Although the Judicial Officer gives great weight to findings of ALJ's because they have the opportunity to see and hear the witnesses testify, the ALJ's finding that respondent did not know that she could not sell her dogs without a license during the period her license application was pending is set aside as "hopelessly incredible." Although there were no previous violations, the numerous violations here warrant a severe sanction.

Dorothea A. Baker, Administrative Law Judge.

Donald Tracy, for complainant.

For respondent, pro se.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a disciplinary proceeding under the Animal Welfare Act, as amended (7 U.S.C. § 2131 *et seq.*), and the regulations and standards issued thereunder (9 CFR § 1.1 *et seq.*). On October 11, 1985, Administrative Law Judge Dorothea A. Baker (ALJ) issued an initial Decision and Order directing respondent to cease and desist from selling dogs in commerce without a license and violating the Act and regulations, and assessing a suspended civil penalty of \$200.

On November 18, 1985, complainant, seeking a \$1,000 civil penalty (with no more than half suspended), appealed to the Judicial Officer, to whom final administrative authority has been delegated to decide the Department's cases subject to 5 U.S.C. §§ 556 and 557 (7 CFR § 2.35).¹ The case was referred to the Judicial Officer for decision on December 21, 1985.

Based on a careful consideration of the entire record in this case, I am assessing a civil penalty of \$1,000. The preliminary statement

¹ The position of Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C. §§ 450c-450g), and Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219 (1953), reprinted in 5 U.S.C. app. at 1068 (1982). The Department's present Judicial Officer was appointed in January 1971, having been involved with the Department's regulatory programs since 1949 (including 3 years' trial litigation; 10 years' appellate litigation relating to appeals from the decisions of the prior Judicial Officer, and 8 years as administrator of the Packers and Stockyards Act regulatory program).

and findings of fact are taken from the ALJ's initial decision, except that Findings 8, 10, 11, 15, 17, 18, and 20 are omitted, and one sentence in Finding 19 is omitted. Additional findings and conclusions by the Judicial Officer follow the ALJ's preliminary statement and findings.

ADMINISTRATIVE LAW JUDGE'S PRELIMINARY STATEMENT AND FINDINGS

This is an administrative proceeding initiated by a Complaint filed September 14, 1983, wherein the Respondent was charged with having violated the Regulations and Standards (9 CFR 1.1, *et seq.*) issued pursuant to the Animal Welfare Act, as amended (7 U.S.C. 2131, *et seq.*), hereinafter sometimes referred to as the Act. The Complaint herein avers that the Respondent at all times material herein was unlicensed but was operating as a "dealer" as that term is defined in section 2(f) of the Act (7 U.S.C. 2132(f)).

The Complaint further alleges that between January 1980 and April 1983 Respondent on numerous occasions, for compensation, sold and offered for transportation in commerce, a total of 383 dogs, without being licensed as a dealer as required by section 4 of the Act (7 U.S.C. 2134). It is further alleged that on the dates of November 10, 1979, May 23, 1980, and April 23, 1981, Respondent's facilities were inspected by Animal and Plant Health Inspection Service personnel as a prerequisite for obtaining a license and that on each such occasion Respondent was notified "that deficiencies existed which would preclude licensing."

In its Complaint, the Complainant seeks a sanction of a Cease and Desist Order and the imposition of a monetary penalty of \$2500.00, which on brief, it reduces to \$1000.00.

An oral hearing was held on May 23, 1985, in Cassville, Missouri, before Administrative Law Judge Dorothea A. Baker. At that time the Complainant was represented by Gary C. Shockley, Esquire, Office of the General Counsel, United States Department of Agriculture, Washington, D. C. 20250-1400, and the Respondent appeared *pro se*. The parties were given the opportunity to file Briefs herein. The Complainant filed its Brief on June 21, 1985, and Respondent, on July 22, 1985. Complainant filed no Reply Brief.

FINDINGS OF FACT

1. Rosia Lee Ennes, hereinafter sometimes referred to as the Respondent, is an individual whose post office address is Route 2, Box 2001, Seligman, Missouri 65745.

2. Respondent became licensed as a dealer under the Animal Welfare Act for the first time on October 12, 1983.

3. The evidence establishes that between January 1980 and April 1983, Respondent, on numerous occasions, for compensation, sold and offered for transportation in commerce between 300 and 400 dogs, without being licensed as a dealer as required by section 4 of the Animal Welfare Act (7 U.S.C. section 2134).

4. Commencing in October 1979 the Respondent sought to obtain a license and filled out an application form therefor together with the help of a friend, Mr. Hughes, whose qualifications are set forth hereinafter, which application the Respondent testified was sent into the Department of Agriculture. However, the Respondent later was advised that it was never received.

5. The Complainant maintains that on November 10, 1979, May 23, 1980, April 23, 1981, June 3, 1983, and August 16, 1983, Respondent's facilities were inspected by Animal and Plant Health Inspection Service personnel, as a prerequisite for obtaining a license. The Complainant maintains and the evidence does show that the Respondent was advised during each of these inspections that deficiencies existed that precluded licensing.

6. The Complainant's evidence shows that during the period January 1980 through April 1983, without being licensed, the Respondent sold approximately 380 dogs, representing a gross remuneration of \$17,882.40 from the sale of such dogs.

7. However, this represents a gross amount and does not include the expenses which would have been incurred in association therewith. For instance, one of the witnesses testified that probably for the most part expenses would have consumed the greater part of the \$17,000.00, as well as having consumed, by way of costs of doing business, the greater part of \$4,000.00, representing gross income from Respondent's business year 1983-84.

8. [Omitted.]

9. After Respondent was advised that her first application was not received, again, with the help of Mr. Hughes, the Respondent submitted a second license application. Thereafter, a number of inspections occurred, referred to as prelicensing inspections, during which time the inspectors found alleged deficiencies in the Respondent's facility. The first inspection occurred on October 10, 1979, and was performed by Mr. Boyd. It was indicated thereon that: "Will re-inspect in 60 days." The next inspection occurred on May 23, 1980, at which time the inspection report referred to "license pending." This inspection was performed by Mr. Sparkman. The next inspection after that did not occur until April 23, 1981, and this was performed by Mr. Sparkman. Included in that inspection report (Complainant's Exhibit No. 16) is the statement: "Violation procedures recommended." Thereafter, the Respondent's facili-

ty was inspected on June 3, 1983, by Mr. Greenwood. On that inspection report where it asks for the date of the last inspection the word "NONE" is written. A further inspection took place of August 16, 1983, by Mr. Sparkman, at which time Respondent's facility was recommended for license.

10. [Omitted.]

11. [Omitted.]

12. The evidence shows that at a time when she was unlicensed the Respondent did sell in commerce 383 dogs.

13. The evidence further shows that the Respondent made a good faith effort to obtain a license. The Respondent did not have the ability to understand what was required on the licensing form and sought out and obtained the advice of an experienced and professional puppy broker, Mr. Hughes. He assisted the Respondent. His testimony indicates that he was well acquainted with the Respondent; that he was aware of the difficulties which she was having with the alleged deficiencies; that he believed the dogs or puppies which he obtained from her facility were among the most healthy and well-kept puppies that he knew of; that the Respondent kept very good records; and that he believed that much of the difficulty in this case could have been precluded had different judgmental factors been obtained.

14. A most credible witness, and one who was called by the Complainant, was Mr. James C. Hughes, a wholesale Puppy Broker for approximately 30 years and who sold dogs as a wholesale broker throughout the United States, Canada and Puerto Rico. He had known the Respondent for approximately 15 years. Mr. Hughes was the current Vice President of the Mid-West Professional Pet Distributors Incorporated, headquartered in Kansas City. Said organization is a nation-wide organization of breeders and brokers across the nation. Mr. Hughes was on the Board of Directors and he was a past President. Mr. Hughes has been regarded by the Judge as a most credible witness and his testimony reflects experience and knowledge in the area of breeding and selling puppies. He testified with respect to the next to the last inspection, where the alleged deficiency related to the fact that one of the little puppies had chewed a corner of his holding box and that the corner did not have the proper paint or varnish on it. It was Mr. Hughes' opinion that this was a minuscule deficiency and was simply something that, if it had to be remedied, could easily have been corrected.

15. [Omitted.]

16. The Government adduced three witnesses whose testimony related to the alleged lack of personnel and resources in order to carry out their functions and the alleged difficulty which the De-

partment was having with the State of Missouri, particularly the southeastern section with respect to unlicensed dealers.

17. [Omitted.]

18. [Omitted.]

19. The selling in commerce of the 380 puppies from January 1980 through April 1983 was a violation of the Act. . . .

20. [Omitted.]

ADDITIONAL FINDINGS OF FACT BY THE JUDICIAL OFFICER

21. On May 23, 1980, Mr. Sparkman, one of complainant's animal health technicians, found deficiencies in respondent's facilities which precluded licensing. He discussed the deficiencies with her and told her that she should not sell dogs wholesale until she was licensed. He told her to contact him for a reinspection when the deficiencies were corrected, but she failed to do so. (Tr. 83-85; CX 15)

22. On April 23, 1981, Mr. Sparkman returned to respondent's premises on his own initiative. Respondent advised him that deficiencies still existed and would not permit him to make an inspection. Mr. Sparkman advised respondent that charges might be initiated against her for not permitting the inspection, and because she was selling animals without a license. He again advised her not to sell animals wholesale, and told her to contact him when the deficiencies were corrected. Respondent failed to contact Mr. Sparkman. (Tr. 85-87; CX 16).

23. On July 1, 1981, respondent was interviewed by Mr. McFather, one of complainant's compliance officers. He warned her not to make any further wholesale sales without a dealer's license. (Tr. 27-28, 64, 67, 77; CX 13B)

24. On June 3, 1983, Dr. Greenwood, Mr. Sparkman's supervisor, inspected respondent's facilities and found deficiencies that precluded licensing (Tr. 88-90; CX 17).

25. On August 16, 1983, Mr. Sparkman again inspected respondent's facilities and found a deficiency that precluded licensing. He again told her not to sell wholesale until she was licensed, and requested her to contact him when the deficiency was corrected. (Tr. 91-92; CX 18)

26. Shortly after the August 16, 1983, inspection, respondent contacted Mr. Sparkman to obtain a reinspection. He inspected the facility on September 27, 1983, and approved it for licensing. (Tr. 91-92; CX 19)

CONCLUSIONS BY THE JUDICIAL OFFICER

The undisputed evidence shows that respondent acted as a dealer between January 1980 and April 1983, as charged in the complaint. The Act defines the term dealer as follows (7 U.S.C. § 2132(f)):

(f) The term "dealer" means any person who, in commerce, for compensation or profit, delivers for transportation, or transports, except as a carrier, buys, or sells, or negotiates the purchase or sale of, (1) any dog or other animal whether alive or dead for research, teaching, exhibition, or use as a pet, or (2) any dog for hunting, security, or breeding purposes, except that this term does not include—

(i) a retail pet store except such store which sells any animals to a research facility, an exhibitor, or a dealer; or

(ii) any person who does not sell, or negotiate the purchase or sale of any wild animal, dog, or cat, and who derives no more than \$500 gross income from the sale of other animals during any calendar year.

It is unlawful to act as a dealer without a license from the Secretary. Specifically, the Act provides (7 U.S.C. § 2134):

§ 2134. *Valid license for dealers and exhibitors required*

No dealer or exhibitor shall sell or offer to sell or transport or offer for transportation, in commerce, to any research facility or for exhibition or for use as a pet any animal, or buy, sell, offer to buy or sell, transport or offer for transportation, in commerce, to or from another dealer or exhibitor under this chapter any animals, unless and until such dealer or exhibitor shall have obtained a license from the Secretary and such license shall not have been suspended or revoked.

The Act authorizes the Secretary to assess a civil penalty of \$1,000 for each violation. The Act provides (7 U.S.C. § 2149(b)):

(b) *Civil penalties for violation of any section, etc.; separate offenses; notice and hearing; appeal; considerations in assessing penalty; compromise of penalty; civil action by Attorney General for failure to pay penalty; district court jurisdiction; failure to obey cease and desist order*

Any dealer . . . that violates any provision of this chapter, or any rule, regulation, or standard promulgated by the Secretary thereunder, may be assessed a civil penalty by the Secretary of not more than \$1,000 for each such violation, and the Secretary may also make an order that such person shall cease and desist from continuing such violation. Each violation and each day during which violation continues shall be a separate offense. . . . The Secretary shall give due consideration to the appropriateness of the penalty with respect to the size of the business of the person involved, the gravity of the violation, the person's good faith, and the history of previous violations. Any such civil penalty may be compromised by the Secretary.

With respect to the first criterion specified by the Act, *viz.*, "the size of the business of the person involved," respondent keeps about 30 to 35 dogs in her kennel, which is a "moderate-sized facility" (Tr. 95). Accordingly, a more modest civil penalty is appropriate than would be assessed against a large-sized facility.

With respect to the second criterion, "the gravity of the violation," the record here shows that respondent made hundreds of sales without a license over a 40-month period, in violation of the Act. The violations proved in this case, operating as a dealer without a license, strike at the very heart of the regulatory program mandated by Congress in the Animal Welfare Act. See H.R. Conf. Rep. No. 1848, 89th Cong., 2d Sess., reprinted in 1966 U.S. Code Cong. Ad. News 2635, 2649. If unlicensed dealers were allowed to operate without fear of serious consequences, the regulatory program could not long survive. The number of sales and extended period of the violations are further aggravating factors. Respondent was licensed as soon as she demonstrated compliance; her unlicensed sales prior to that time constitute grave violations of the Animal Welfare Act that warrant a more severe sanction than that requested by complainant.

The third factor to be considered is respondent's "good faith." Although respondent presented her efforts to obtain a license as a mitigating factor, her efforts in fact demonstrate her knowledge of the requirements of the Act.

The ALJ found that respondent did not know that she could not sell her dogs during the period her license application was pending. Specifically, the ALJ found (Initial Decision at 4, 8, 9):

8. Although the Complainant maintains that the Respondent was warned in April of 1980 and July of 1981, the Respondent denies this and was under the belief that

she could continue operating while her application for license was pending. The Respondent indicated that the first notice which she received and which she understood was in 1983 and that thereafter from May 1983 she did not sell any puppies until the time she became licensed.

* * * * *

15. Respondent denies she was given "warnings"—her belief was that each time an inspector came, she would have additional things to correct. And, in her Brief she contests the fact that Inspector McFather ever talked to her on the occasion to which he testified. He may have talked to her daughter.

Based upon an evaluation of the entire record herein, the most persuasive evidence is to the effect that Mr. Danny McFather, Compliance Officer, who allegedly made an inspection of her facility on July 1, 1981, did not give her the warnings, or explanations, as contended by the Complainant. The Respondent refutes on Brief and at the hearing (Tr. 54, 74) that she ever saw this inspector on July 1, 1981. Also, the witness's (Mr. McFather) recollection concerning this alleged inspection was premised solely upon his interview log which he had reviewed the morning of the hearing. He possessed no independent recollection of the inspection nor any of the details relating to same. Although the witness was given to testifying as to what "standard procedure" was involved, nevertheless, his uncertainty relative to this inspection gives credence to the contention of the Respondent that she did not see nor talk to Mr. McFather on July 1, 1981.

* * * * *

17. Although there is conflicting testimony as to what the various inspectors told Mrs. Ennes, the more persuasive evidence and based upon her credibility I am finding that she either was not told or she did not understand that while her license was pending she could not sell dogs. Mrs. Ennes testified, and I believe her, that she was under the impression that inasmuch as she had a license pending she could sell the dogs as long as she was making an effort to bring her facility up to the standards required by the inspectors.

18. Furthermore, Mr. Hughes corroborated her understanding of the situation.

It is the consistent practice of the Judicial Officer to give great weight to the findings by Administrative Law Judges since they have the opportunity to see and hear the witnesses testify.² However, findings of fact, even when based on the ALJ's determination as to the credibility of witnesses, may be set aside if they are "hopelessly incredible." *Fairbank v. Hardin*, 429 F.2d 264, 268 (9th Cir. cert. denied, 400 U.S. 943 (1970)). In the present case, I find the ALJ's findings that respondent did not know that she was violating the law by selling dogs wholesale while her license application was pending "hopelessly incredible."

Mr. Sparkman, one of complainant's animal health technicians who inspected respondent's facilities, testified that he told respondent on three occasions that she could not sell animals wholesale until she received her license. Mr. Sparkman testified with respect to his May 23, 1980, inspection (Tr. 84-85):

Q. Did you have occasion on that visit to discuss licensing requirements with Mrs. Ennes?

A. Yes, I did. I indicated to her the need for her to correct these deficiencies and that in order to be licensed she would need to correct those, and I mentioned to her that she should not sell wholesale until she was licensed.

Mr. Sparkman further testified with respect to his attempt to inspect respondent's facilities on April 23, 1981 (Tr. 86-88):

The WITNESS: . . . And [I] also mentioned to her that possibly violation charges might be initiated because she wouldn't allow me to make the inspection and because she was selling animals.

* * * * *

Q. Now, Mr. Sparkman, when you left after your visit of April 23, 1981, again sir, what was your understanding with Mrs. Ennes about when you would be back?

² *E.g.*, *In re King Meat Packing Co.*, 40 Agric. Dec. 552, 553 (1981); *In re Thornton*, 38 Agric. Dec. 1425, 1426-28 (remand order), *final decision*, 38 Agric. Dec. 1539 (1979) (affirming Judge Baker's dismissal of complaint where she accepted the testimony of respondent's wife, respondent's employee, and respondent's "real good friend" over that of three disinterested USDA veterinarians); *In re Unionville Sales Co.*, 38 Agric. Dec. 1207, 1208-09 (1979) (remand order); *In re National Beef Packing Co.*, 36 Agric. Dec. 1722, 1736 (1977), *aff'd*, 605 F.2d (10th Cir. 1979).

A. I told her again that she should not sell wholesale and if she got it, even at that point, if she got it in compliance that she could contact me, she should contact me.

Mr. Sparkman testified with respect to his inspection of respondent's facilities on August 16, 1983 (Tr. 92):

A. She had another deficiency, as indicated on the report. I indicated that when she corrected this and if there wasn't no other deficiencies on a return trip, that we could license her and that she still should not sell wholesale until she was licensed. And to my knowledge, she understood that.

In addition, Mr. McFather, a Compliance Officer for complainant, testified that he interviewed respondent on July 1, 1981, and warned her not to make any further wholesale sales without a dealer's license. He testified (Tr. 27-28, 64, 67, 77):

Q. And what did you do when you visited Mrs. Ennes in 1981?

A. Well, when I first arrived, I introduced myself, I informed Mrs. Ennes as to the nature of my visit and I explained to her her rights under the Miranda Rule.

Q. Was it customary to give Miranda Warnings at that time?

A. Yes, it was.

Q. And, then, what did you discuss with Mrs. Ennes?

A. Her sales of dogs.

Q. Did you discuss with her the requirements of the Animal Welfare Act in any way?

A. Yes, sir, I did.

Q. Did you discuss the licensing requirements with her?

A. I did.

Q. Was Mrs. Ennes aware of these requirements, or was this the first time she'd heard of it?

A. She told me that she was aware that she was required to have a license, a dealer's license, to sell dogs wholesale.

* * * * *

The WITNESS: Again, I have to go by what would be standard procedure and what I have written on my interview log.

Judge BAKER: Do you have any independent recollection of what occurred?

The WITNESS: I do remember going there and discussing with Miss Ennes her sales, warning her against not making any further sales.

* * * * *

The WITNESS: As I left Mrs. Ennes' residence, I drove down the road just a short distance and I stopped and recorded the information which was later typed on an interview log, which I signed.

* * * * *

Judge BAKER: Do you have any other questions, Mrs. Ennes?

Mrs. ENNES: I don't guess. I just never talked to him.

The WITNESS: Your Honor?

Judge BAKER: Mr. McFather?

The WITNESS: I'd like to make a comment that more than likely at the time I was there, I was wearing a cap and also I may not have had a mustache at that time.

Judge BAKER: Could you borrow somebody's cap? Did you recognize Mrs. Ennes, Mr. McFather?

The WITNESS: Yes, I did.

Mr. McFather's interview log, which was referred to in his testimony, states (CX 13B):

After identifying myself and stating the nature of my visit, I explained to Mrs. Ennes her rights under the Miranda Rule. Mrs. Ennes stated she sold puppies to individuals and did not know what they did with them nor was it her concern. She did know that selling dogs wholesale without a dealer's license was a violation of the Animal Welfare Act and regulations. Her breeding stock consisted of approximately 30 bitches and several males. She would

like to have her kennel licensed but could not afford to fix it up to meet the requirements.

The ALJ's view as to respondent's lack of knowledge would be destroyed if she received and understood any one of the four warnings referred to by Mr. Sparkman and Mr. McFather. The evidence set forth above comes from two disinterested government employees who would have no apparent motive for giving false testimony. Respondent, on the other hand, had a clear motive for being less than candid. Moreover, her testimony as to her lack of knowledge, when carefully analyzed, is quite weak. It strongly suggests that she knew that it was unlawful to sell dogs without a license to a wholesale broker, but she did not believe that complainant would bother to prosecute her for violations while her license application was pending. Specifically, she testified (Tr. 155-61, 170; emphasis added):

Q. Did you make any calls to inquire about the status of your license?

A. No, I sure didn't. As far as me making no calls, no, I didn't. I took it as, when I filled it out, they would come back and inspect me. Maybe I didn't understand. Just like Sparkman, *I thought as long as I was trying to do these things that they told me to do, I didn't know that I would be prosecuted if I would go ahead and sell my dogs.*

Because I told him, and he will verify it, that I told him that was the only way I had of doing this work on this. I'd sell some puppies. Then I would proceed to go on with—my money went right back into them.

* * * * *

. . . But then, like I said, in May of '83, May the 3rd of 1983. I have the letter. And here is the letter. *They notified me—you can read the letter—that I had been selling without a license, and if I continued to sell the dogs without the license, I would be prosecuted. That was the first that I knew that I would be prosecuted, was May the 5th of 19 and 83.*

* * * * *

The WITNESS: . . . They sent me some literature [in May 1983]. Well, it was a book, a couple of books came with this altogether. And it was certified. I signed for it. It

was a certified letter. *And that is the first I knew that would be prosecuted and then I didn't sell no more. . . .*

But I still didn't get this until '83. And that's the first time I knew—I thought as long as I was working on my kennel—that was what I was led to believe. As long as I was doing and trying to do, that I could go ahead and sell. And I had to do the kennel as my money permitted. I mean, I had no other choice or else—and there was no way I could feed the dogs.

Q. (By Judge Baker) Did Mr. Boyd know that you were selling dogs?

A. Yes. I told him I was.

Q. Did Mr. Sparkman know you were selling dogs?

A. Yes. Yes.

Q. Did Mr. Greenwood know you were selling dogs?

A. Yes, I told them. They asked me who I was selling and I told them. I told them I was selling to Jim Huggins except a few that I have—I still sell a few out the door if somebody calls me. I don't advertise for them but if I do, if I don't have the puppy booked, I will sell it out the door. In fact, I probably could sell more of them out the door if I had advertised them but I didn't. I didn't feel like anything I was doing was wrong.

Q. Do you want to continue?

A. Well, other than that, that is all I know. And after I got this letter, then I didn't sell no more puppies. I just quit breeding them until I could go ahead and get my license. . . .

* * * * *

And then in September is when I got this deal here that I was being prosecuted. After, in May. And here it is.

Q. And you are referring to the Complaint?

A. Yes, that is the first letter I got. And that is the first thing. This letter here is the first thing I got that I would be prosecuted. The first citation or anything that anybody told me. I thought as long as I was fixing my kennel, that

O.K. *They didn't tell me that I would be prosecuted if I had sold those puppies.*

I wasn't fixing my kennel, you know. But I thought as I was doing like they told me to do—

* * * * *

THE BAKER: Is there anything else you would like to mention in this case in this matter?

ENNES: No. I do know I asked Mr. Sparkman about selling puppies out the door if I didn't have a license, at the time I got this letter [in May 1983]. And, you know, if I could sell them out the door. And he said I could. From my perspective, you know. And that is the only way I had to sell them. And he told me that it was O.K. to do that. But I couldn't sell them to a broker until I got my license. That was after I got this letter.

The respondent did, at times, state that she thought that it was all right to sell dogs without a license, she stated more frequently that she thought she would not be prosecuted for selling dogs without a license. The ALJ found that respondent's testimony was corroborated by Mr. Hughes. But it is only this latter aspect of her testimony, in this respect, that was corroborated by Mr. Hughes—she thought she would not be prosecuted for selling dogs without a license while her license application was pending. Specifically, Mr. Hughes testified (Tr. 21-23, 128, 136; emphasis added):

THE WITNESS: . . . I think she's an honest and forthright woman that wouldn't purposely violate the law. I think that she has been somewhat misled to the fact that everyone all around her are doing the same thing she has done and there's a laxity in Animal Welfare for licensing dogs, so it led her into a false sense of security, you might say, that nothing was going to happen about this.

At the time she realized the seriousness of it, she started trying to get a license [in 1979]. At the time she applied for a license, when they came out and inspected her, she had to clean up her kennel as well as possible. The Department didn't come back to re-examine her at the time they were supposed to and the things that she had done deteriorated over a nine or ten-month period until she had to do it over again. It just was a comedy of errors, you might say, in this thing, that had the Department re-in-

spected her the way they have other people, she would have got the license many years ago.

* * * * *

Judge BAKER: Very well. Mr. Hughes, you have an opinion as to the desire or the manifestation of the Respondent, Mrs. Ennes' desire to comply with the law? Do you believe that she wishes to comply with the law, if she knows what it is?

The WITNESS: Yes, I really do. In fact, she has complied with the law now in the past year. And in defense of Mrs. Ennes, in all the time she was not licensed, her facility was usually equal to that of other ones that I visited that were licensed. She would have minor discrepancies in different places. But she's an honest woman, I believe.

* * * * *

It is kind of customary with most breeders when they apply for this license, that as long as they are working on it, these sort of actions are not instigated. *And I probably was somewhat at fault in giving her false advice because I told her as long as she continued to try to cooperate that this action would not be initiated against her.*

There were several other people that this same action was initiated again, one being June Parks, which you had a check mixed in with her stuff today. But several of these people that action could have been initiated against, were not once they applied for a license past, and received their license.

* * * * *

. . . This lady has not tried to avoid the Laws. She has been there since 1979, trying to get a license.

Our contention is that had the inspections been done at the time that they should have been done, she would have been in compliance. And they weren't done until 7-8-9-10 months later. At which time, the paints and the cleanup, and the cutting the weeds and fixing the wire, had deteriorated again.

Considering all of the evidence in this case, I find the ALJ's findings that respondent did not know that it was unlawful to sell dogs

without a license while her license application was pending "hopelessly incredible." I infer that she was fully aware of the requirements of the Act, and that she knowingly and intentionally continued to violate the Act by selling dogs wholesale without a license on the mistaken belief that the Department would not "prosecute" her for such violations. Accordingly, her violations were not committed in good faith but, rather, were knowingly and intentionally committed in violation of the Animal Welfare Act.

Mr. Hughes' view that respondent's facilities would have been approved much earlier if the inspections had occurred before conditions "deteriorated again" (Tr. 136) is not a mitigating circumstance. The delay in the inspections was caused by respondent's failure to contact Mr. Sparkman, as he repeatedly told her to do (Findings 21-26). Furthermore, the purpose of a pre-license inspection is to determine if an applicant can maintain minimal standards of cleanliness *at all times*; not whether on *one day* the place can be clean. Respondent's argument that "the paints and the cleanup, and the cutting the weeds and fixing the wire, had deteriorated again" (ALJ's Decision at 5) is an admission that she was properly not licensed, not a mitigating factor. (The situation may have been different if respondent ceased operations because she could not get a license and therefore her facility deteriorated; but, on the contrary, respondent continued to operate and sell dogs without a license in violation of the Act.)

The last of the criteria to be considered is the "history of previous violations." Although there were no previous violations, the hundreds of violations proven here are enough in themselves to warrant a severe sanction.

Considering the statutory criteria for determining sanctions under the Animal Welfare Act, a civil penalty of \$2,500, as originally requested in the complaint, would have been very modest for the hundreds of deliberate and serious violations involved here. Complainant's recommendation after the hearing for a civil penalty of only \$1,000 is too modest, and complainant's latest recommendation on appeal (interposing no objection to suspension of half of a \$1,000 civil penalty based on respondent's ability to pay) is far too modest to be acceptable.³ However, in deference to the administrative recommendation, I will assess a civil penalty of only \$1,000 in

³ The statute permits the Secretary to compromise the civil penalty if respondent cannot afford to pay it (7 U.S.C. § 2149(b)). Accordingly, there is no need to take ability to pay into consideration when assessing the civil penalty.

this case, although a greater civil penalty would have been assessed if complainant had so requested.⁴

For the foregoing reasons, the following order should be

ORDER

Respondent is assessed a civil penalty of \$1,000, which is paid not later than the 90th day after service of this order by certified check or money order, made payable to the United States Treasury and sent to Donald A. Tracy, United States Department of Agriculture, Office of the General Counsel, Room 201, Building, Washington, D.C. 20250.

Respondent, her agents, employees, successors and assigns, directly or indirectly, or through any corporation, partnership or other device whatsoever, shall cease and desist from selling dogs in commerce in violation of 7 U.S.C. § 2134.

The cease and desist provisions of this order shall become operative on the day after service of this order on respondent.

In re: DEAN PAUL. AWA Docket No. 360. Decided March 6

Sale of guinea pigs without license—Refusing to allow inspection of premises—Penalty.

The Judicial Officer affirmed Chief Judge Campbell's order assessing a \$3,000 penalty and a cease and desist order because respondent sold guinea pigs without a license and refused to permit an inspection of his premises. Failure to answer within 20 days constitutes an admission of the allegations in the complaint and a waiver of hearing. A document is not filed with the Hearing Clerk until it reaches the Hearing Clerk. Respondent has shown no basis for setting aside the fault decision here. It is unlawful to act as a dealer without a license and to refuse to permit an inspection. Respondent cannot present new facts for the first time on appeal. Agencies should be free to fashion rules of procedure to enable them to efficiently discharge their multitudinous duties. Respondent's oral statement that he did not file an annual report and pay the renewal license fee did not automatically annul his license.

⁴ Where the administrative recommendation for a sanction is so lenient that it would not effectuate the purposes of the Act, the Judicial Officer will *sua sponte* increase the sanction. See *In re Esposito*, 38 Agric. Dec. 613, 623 n.7 (1979). But that is not the case here.

John A. Campbell, Administrative Law Judge.

Kevin F. Meckus, for complainant.

For respondent, *pro se*

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a disciplinary proceeding under the Animal Welfare Act, as amended (7 U.S.C. § 2131 *et seq.*), and the regulations and standards issued thereunder (9 CFR § 1.1 *et seq.*). On December 3, 1985, Chief Administrative Law Judge John A. Campbell (ALJ) issued an initial Decision and Order directing respondent to cease and desist from violating the Act and regulations, and assessing a civil penalty of \$3,000, because respondent sold guinea pigs without a license and refused to permit an inspection of his premises.

On January 10, 1986, respondent appealed to the Judicial Officer, to whom final administrative authority has been delegated to decide the Department's cases subject to 5 U.S.C. §§ 556 and 557 (7 CFR § 2.35).¹ The case was referred to the Judicial Officer for decision on February 6, 1986.

Oral argument before the Judicial Officer, which is discretionary (7 CFR § 1.145(d)), was requested by respondent, but is denied inasmuch as the issues are not difficult and oral argument would seem to serve no useful purpose.

Based upon a careful consideration of the record, the initial Decision and Order is adopted as the final Decision and Order in this case, except that a few minor changes are made in the order. Additional conclusions by the Judicial Officer follow the ALJ's conclusions.

ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION

This is a proceeding under the Animal Welfare Act, as amended (7 U.S.C. 2131 *et seq.*), hereinafter referred to as the "Act," and the regulations and standards issued thereunder (9 CFR 1.1 *et seq.*). A complaint issued by the Administrator of the Animal and Plant Health Inspection Service in accordance with the applicable Rules

¹ The position of Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C. §§ 450c-450g), and Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219 (1953), reprinted in 5 U.S.C. app. at 1068 (1982). The Department's present Judicial Officer was appointed in January 1971, having been involved with the Department's regulatory programs since 1949 (including 3 years' trial litigation; 10 years' appellate litigation relating to appeals from the decisions of the prior Judicial Officer; and 8 years as administrator of the Packers and Stockyards Act regulatory program).

of Practice was duly served upon the Respondent (7 CFR 1.147(b)).

Respondent's failure to file an answer responsive to the complaint allegations within the time specified in the complaint constitutes an admission of the facts alleged in the complaint, a waiver of hearing (7 CFR 1.136(a), 1.139). Therefore, this Decision and Order is entered according to the Rules of Practice (7 CFR 1.139).

FINDINGS OF FACT

1. Dean Daul, hereinafter referred to as respondent, is an individual whose mailing address is RFD #1, Box 265, Luxemburg, Wisconsin 54217.

2. Until January 15, 1985, respondent was licensed under the law as a Class A dealer.

3. At the time respondent's license No. 35-A-77 was issued on November 14, 1983, respondent received a copy of the regulations and standards contained in Title 9, Chapter 1, Subchapter A of the Code of Federal Regulations and agreed to comply with said regulations and standards.

4. On January 15, 1985, respondent's Animal Welfare License Number 35-A-77 was officially terminated due to failure to submit the annual report and license fee required by 9 CFR § 2.5(b)(1).

5. Respondent has been found to be in violation as follows:

a. On January 23, 1985, respondent sold and shipped 38 guinea pigs to a research facility without an effective Animal Welfare License in violation of Section 4 of the Animal Welfare Act, 7 U.S.C. 2134.

b. On February 5, 1985, respondent sold and shipped 52 guinea pigs to a research facility without an effective Animal Welfare License in violation of Section 4 of the Animal Welfare Act, 7 U.S.C. 2134.

c. On January 9, 1985, respondent refused to permit Dr. Richard Bertz and Robert Schmoll of the U.S. Department of Agriculture, Animal and Plant Health Inspection Service, to conduct an inspection of respondent's premises during ordinary business hours in violation of the Animal Welfare Act, 7 U.S.C. 2146(a), and the regulations promulgated thereunder, 9 CFR § 2.126 (1985).

The violations set forth herein warrant the sanctions authorized under the Act (7 U.S.C. 2149(a), (b)), and contained in the following:

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Under the Department's rules of practice governing formal adjudicatory administrative proceedings instituted by the Secretary, a respondent's failure to file an answer with the Hearing Clerk within 20 days after service of the complaint constitutes an admission of the allegations in the complaint and a waiver of hearing. Specifically, the rules of practice provide (7 CFR §§ 1.136(a)-(c), § 99):

§ 1.136 *Answer.*

(a) *Filing and service.* Within 20 days after the service of the complaint . . . the respondent shall file with the Hearing Clerk an answer signed by the respondent or the attorney of record in the proceeding. . . .

(b) *Contents.* The answer shall: (1) Clearly admit, deny, or explain each of the allegations of the Complaint and shall clearly set forth any defense asserted by the respondent; or

(2) State that the respondent admits all the facts alleged in the complaint; or

(3) State that the respondent admits the jurisdictional allegations of the complaint and neither admits nor denies the remaining allegations and consents to the issuance of an order without further procedure.

(c) *Default.* Failure to file an answer within the time provided under § 1.136(a) shall be deemed, for purposes of the proceeding, an admission of the allegations in the Complaint, and failure to deny or otherwise respond to an allegation of the Complaint shall be deemed, for purposes of the proceeding, an admission of said allegation, unless the parties have agreed to a consent decision pursuant to § 1.138.

* * * * *

§ 1.139 *Procedure upon failure to file an answer or admission of facts.*

The failure to file an answer, or the admission by the answer of all the material allegations of fact contained in the complaint, shall constitute a waiver of hearing. Upon such admission or failure to file, complainant shall file a proposed decision, along with a motion for the adoption

thereof, both of which shall be served upon the respondent by the Hearing Clerk.

Within 20 days after service of such motion and proposed decision, the respondent may file with the Hearing Clerk objections thereto. If the Judge finds that meritorious objections have been filed, complainant's Motion shall be denied with supporting reasons. If meritorious objections are not filed, the Judge shall issue a decision without further procedure or hearing.

The rules of practice expressly state the obvious fact that any document is not "filed with the Hearing Clerk" until it "reaches" the Hearing Clerk (unless it is filed with the ALJ in appropriate circumstances). Specifically, the rules provide (7 CFR § 1.147(a), (d):

§ 1.147 *Filing; service; extensions of time; and computation of time.*

(a) *Filing; number of copies.* . . . Any document or paper required or authorized under the rules in this part to be filed with the Hearing Clerk shall, during the course of an oral hearing, be filed with the Judge.

* * * * *

(d) *Effective date of filing.* Any document or paper required or authorized under the rules in this part to be filed shall be deemed to be filed at the time when it reaches the Hearing Clerk; or, if authorized to be filed with another officer or employee of the Department it shall be deemed to be filed at the time when it reaches such officer or employee.

The complaint in this case contained allegations identical to Findings 1-4 and paragraphs (a), (b) and (c) of Finding 5, *supra*, and advised respondent that complainant was seeking a \$3,000 civil penalty and a cease and desist order. The complaint advised respondent that an answer must be filed with the Hearing Clerk within 20 days, as follows (Complaint at 2-3):

WHEREFORE, in accordance with the Rules of Practice, this complaint shall be served upon respondent. Respondent is hereby afforded an opportunity to submit a written answer to the allegations set forth herein and to request an oral hearing on such allegations according to the Rules of Practice (7 CFR §§ 1.136, 1.141). Any such answer and/or request must be filed with the Hearing Clerk, U.S. De-

partment of Agriculture, Washington, D.C. 20250, within 20 days of the service of this complaint.

In addition, the letter from the Hearing Clerk serving a copy of the complaint on respondent expressly advised respondent of the effect of failure to file an answer with the Hearing Clerk within 20 days. The letter states:

In accordance with the rules of practice governing proceedings under the Act, a copy of which is enclosed, you will have 20 days from the receipt of this letter within which to file with the Hearing Clerk an original and *three* copies of your answer. Your answer should contain a definite statement of the facts which constitute the grounds of defense, and should specifically admit, deny or explain each of the allegations of the complaint. Failure to file an answer to or plead specifically to any allegation of the complaint shall constitute an admission of such allegation.

Within the same time allowed for the filing of your answer, you may, if you wish, request an oral hearing. Failure to file such a request will constitute a waiver, on your part, of oral hearing.

The return receipt card shows that respondent was served with a copy of the complaint on September 25, 1985. Respondent's answer was, therefore, required to be filed with the Hearing Clerk by October 15, 1985. Instead, respondent's answer dated October 15, 1985 (the date it was required to be filed with the Hearing Clerk), was not received by the Hearing Clerk until October 21, 1985. Since respondent failed to file an answer within the specified time period, the default Decision and Order was properly issued in this case. Although on rare occasions default decisions have been set aside for good cause shown or where complainant did not object,² respondent has shown no basis for setting aside the default decision here.³

² *In re Veg-Pro Distributors*, 42 Agric. Dec. 273 (1983) (remand order), *final decision*, 42 Agric. Dec. ____ (July 18, 1983) (default decision set aside because service of the complaint by registered and regular mail was returned as undeliverable, and respondent's license under the Perishable Agricultural Commodities Act had lapsed before service was attempted); *In re J. Fleishman & Co.*, 38 Agric. Dec. 789 (1978) (remand order), *final decision*, 37 Agric. Dec. 1175 (1978); *In re Christ*, L.A.W.A. Docket No. 24 (Nov. 12, 1974) (remand order), *final decision*, 35 Agric. Dec. 195 (1976); and see *In re Gallop*, 40 Agric. Dec. 217 (order vacating default decision) (case remanded to determine whether just cause exists for permitting late answer), *final decision*, 40 Agric. Dec. 1254 (1981).

³ See *In re Cuttone*, 44 Agric. Dec. ____ (Aug. 20, 1985); *In re Corbett Farms, Inc.*, 43 Agric. Dec. ____ (Nov. 1, 1984); *In re Jacobson*, 43 Agric. Dec. ____ (June 26, 1984);

In addition, respondent's (untimely) answer states in its entirety:

This is in response to AWA Docket # 360. I will not set forth any explanation at this time. I request a hearing in the city of Green Bay.

Hence even if respondent's answer had been timely filed, if answer did not deny or otherwise respond to the allegations of the complaint and, therefore, the answer, even if timely filed, would have warranted the issuance of a default decision, under the rule quoted above.

Since respondent failed to file a timely answer, complainant filed a motion for a proposed decision pursuant to the rules of practice quoted above. Complainant's proposed decision was identical to the decision subsequently signed by the ALJ. Although respondent's response to the proposed decision was due to be filed with the Hearing Clerk on November 25, 1985, again respondent waited until the due date to mail his reply, which was not received by the Hearing Clerk until November 29, 1985, i.e., 4 days late. Moreover, the response admits that "all of the allegations [of the complaint] are correct." Specifically, respondent's response states in its entirety:

This is in regard to proceedings AWA 360.

In the letter of Proposed Decision and Order you have an insinuation that my answer was late. Let me tell you that I have to respond within 20 days to the post office of my choice. My receipt #PO15-537-162 is dated Oct. 16, 1985, now don't tell me that my reply was late. As you will notice this reply will be sent by certified mail on the 20th day, don't come along with that excuse of late filing. As to making any plea, there was nothing to deny as all of the allegations are correct. The thing that needs to be resolved is whether any laws have been violated. My objection to Order and Proposed Decision is based on the fact that even though allegations may be correct, it does not make them a violation of the AWA laws. Also the fact that someone conveyed to me that there seems to be a predetermined feeling within your department that I am a Bad Ass makes me a little angry. Therefore, to deny me a hearing

In re Buzun, 43 Agric. Dec. ____ (June 13, 1984); *In re Mayer*, 43 Agric. Dec. ____ (Apr. 12, 1984) (decision as to respondent Doss), *appeal dismissed*, No. 84-4316 (6th Cir. July 25, 1984); *In re Lambert*, 43 Agric. Dec. ____ (Jan. 4, 1984); *In re Berhau*, 43 Agric. Dec. 764 (1983); *In re Rubel*, 42 Agric. Dec. 800 (1983); *In re Pastures, Inc.*, 38 Agric. Dec. 395, 396-397 (1980); *In re Seal*, 39 Agric. Dec. 370, 371 (1980); *In re The Maston Beef & Veal, Inc.*, 39 Agric. Dec. 171, 172 (1980).

would be denying me the basic right to defend myself and to prove that no laws have been violated.

Based on the record before him, it was entirely appropriate for the ALJ to issue the decision and order proposed by complainant. The violations charged in the complaint relate to selling animals without a license and refusing to permit an inspection during ordinary business hours, both of which are violations of the regulatory program.

As to the selling violations, it is unlawful to act as a dealer without a license from the Secretary. Specifically, the Act provides (7 U.S.C. § 2134):

§ 2134. Valid license for dealers and exhibitors required

No dealer or exhibitor shall sell or offer to sell or transport or offer for transportation, in commerce, to any research facility or for exhibition or for use as a pet any animal, or buy, sell, offer to buy or sell, transport or offer for transportation, in commerce, to or from another dealer or exhibitor under this chapter any animals, unless and until such dealer or exhibitor shall have obtained a license from the Secretary and such license shall not have been suspended or revoked.

Similarly, as to respondent's refusal to permit agents of the Secretary to conduct an inspection of his premises during ordinary business hours, that, too, violated the Act and regulations, which provide (7 U.S.C. § 2146(a); 9 CFR § 2.126):

§ 2146. Administration and enforcement by Secretary

(a) Investigations and inspections

The Secretary shall make such investigations or inspections as he deems necessary to determine whether any dealer, exhibitor, intermediate handler, carrier, research facility, or operator of an auction sale subject to section 2142 of this title, has violated or is violating any provision of this chapter or any regulation or standard issued thereunder, and for such purposes, the Secretary shall, at all reasonable times, have access to the places of business and the facilities, animals, and those records required to be kept pursuant to section 2140 of this title of any such dealer, exhibitor, intermediate handler, carrier, research facility, or operator of an auction sale.

§ 2.126 Access and inspection of records and property.

Each dealer, exhibitor, operator of an auction sale, or research facility, shall, during ordinary business hours, permit Veterinary Services representatives, or other Federal officers or employees designated by the Secretary, to enter his place of business to examine records required to be kept by the Act and the regulations in this part, and to make copies of such records, and permit Veterinary Services representatives to enter his place of business, to inspect such facilities, property and animals as such representatives consider necessary to enforce the provisions of the Act, the regulations and the standards in this subchapter. The use of a room, table, or other facilities necessary for the proper examination of such records and inspection of such property or animals shall be extended to such authorized representatives of the Secretary by the dealer, exhibitor, operator of an auction sale, or research facility, his agents and employees.

The Act authorizes the Secretary to assess a civil penalty of \$1,000 for each violation of the Act or regulations. The Act provides (7 U.S.C. § 2149(b)):

(b) *Civil penalties for violation of any section, etc.; separate offenses; notice and hearing; appeal; considerations in assessing penalty; compromise of penalty; civil action by Attorney General for failure to pay penalty; district court jurisdiction; failure to obey cease and desist order*

Any dealer . . . that violates any provision of this chapter, or any rule, regulation, or standard promulgated by the Secretary thereunder, may be assessed a civil penalty by the Secretary of not more than \$1,000 for each such violation, and the Secretary may also make an order that such person shall cease and desist from continuing such violation. Each violation and each day during which a violation continues shall be a separate offense. . . . The Secretary shall give due consideration to the appropriateness of the penalty with respect to the size of the business of the person involved, the gravity of the violation, the person's good faith, and the history of previous violations. Any such civil penalty may be compromised by the Secretary.

Accordingly, the ALJ properly issued the decision and order proposed by complainant.

Respondent was served with a copy of the ALJ's decision and order on December 7, 1985. The Hearing Clerk's service letter advised him that he had "30 days from receipt of this notice in which to file with the Hearing Clerk an appeal to the Secretary." However, respondent's appeal was not filed until January 10, 1986, i.e., 4 days late. In his appeal, respondent, for the first time, set forth his defense to the violations. As to the refusal to permit an inspection of his premises on January 9, 1985, respondent states (Appeal at 1):

Sub Part C On this matter let me call your attention to AWA No. 311 and AWA 328 Order for Voluntary Dismissal dated 3-22-85 by Dorothea A. Baker wherein it stated that I no longer had Guinea Pigs. At the time that Mr. Bertz made his appearance at my place the animals were still on my premises, as you don't move a whole colony 400 miles in the dead of winter.

Mr. Bertz asked me if I wanted to file an annual report and pay license fee. According to Title 9, Sub Chapter A, Regulations #2.5 Duration of license Sub Part B. Being that Mr. Bertz was giving me notice and opportunity as stated in Sub Part B. My answer of no, amounted to automatic termination of license and automatic termination of authority. Therefore Mr. Bertz's request to inspect building amounted to nothing more than an illegal search.

These facts, which are set forth for the first time on appeal, come much too late. As explained above, respondent had an opportunity to file a timely answer explaining any allegation of the complaint and setting forth any defense asserted by the respondent. But he failed to file a timely answer, and his late answer failed to deny or explain any allegation or set forth any defense. It is well settled that respondent cannot raise new issues on appeal or present new facts for the first time on appeal.⁴

The requirement in the Department's rules of practice that respondent deny or explain any allegation of the complaint and set forth any defense in a timely answer is necessary to enable this Department to handle its large workload in an expeditious and economical manner. During the last fiscal year, the Department's five

⁴ *In re Evans Potato Co.*, 42 Agric. Dec. 408, 409-10 (1983); *In re Robinson*, 42 Agric. Dec. 7 (1983), *aff'd*, 718 F.2d 836 (10th Cir. 1983); *In re Winger*, 38 Agric. Dec. 182, 187 (1979), *appeal dismissed*, No. 79-C-126 (W.D. Wis. June 1979); *In re Lamers Dairy, Inc.*, 36 Agric. Dec. 265, 289 (1977), *aff'd sub nom. Lamers Dairy, Inc. v. Bergland*, No. 77-C-173 (E.D. Wis. Sept. 28, 1977), *printed in* 36 Agric. Dec. 1642, *aff'd*, 607 F.2d 1007 (7th Cir. 1979), *cert. denied*, 444 U.S. 1077 (1980).

ALJ's (who do not have law clerks) disposed of 421 cases. The Department's Judicial Officer (who does not have a law clerk) disposed of 45 cases (including one on remand from the Seventh Circuit that required a 529-page decision to justify an 8-month suspension order and a \$10,000 civil penalty for 14 separate livestock violations based on circumstantial evidence). Last month, 66 new cases were filed with the Hearing Clerk. The Department does not have the time or resources to hold a hearing at this late date of this respondent, who did not file a timely answer and did not choose to "set forth any explanation at this time" when his (untimely) answer was filed.

The courts have recognized that administrative agencies "should be 'free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties.' " ⁵ If respondent were permitted to raise the defenses which he explained for the first time on appeal to the Judicial Officer, all other respondents in all other cases would have to be afforded the same privilege. Permitting such practice would greatly delay the administrative process and would require additional personnel. However, there is no basis for permitting respondent to raise these defenses at this time.

But even if respondent were permitted to raise these defenses, respondent is in error in believing that when he *orally* said he did not want to file an annual report and pay the license fee, that amounted to an automatic termination of his license. The regulations provide (9 CFR § 2.5):

§ 2.5 *Duration of license.*

(a) A license issued under this part shall be valid and effective unless:

(1) Said license has been revoked or suspended pursuant to section 19 of the Act.

(2) Said license is voluntarily terminated upon the request of the licensee in writing to the Veterinarian in Charge.

(b) Failure by a licensee to pay the annual license fee as required by §§ 2.1 and 2.6 or to file the annual report as required by § 2.7 on or before the anniversary date of his license shall result in automatic termination of the license:

⁵ *Cella v. United States*, 208 F.2d 783, 789 (7th Cir. 1953), cert. denied, 347 U.S. 1016 (1954), quoting from *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 143 (1940); accord *Swift & Co. v. United States*, 308 F.2d 849, 851-52 (7th Cir. 1962)

Provided, however, That prior to such termination the licensee shall be given notice and opportunity to comply with the annual license fee and reporting requirements. Failure to comply with the annual license fee and reporting requirements within 60 days from receipt of such notice shall result in automatic termination of license.

(c) A license which is invalid under paragraph (a) of this section shall be surrendered to the Veterinarian in Charge in the State where the license was issued.

Under the regulation, respondent had until the anniversary date of his license in which to pay the annual license fee and file the annual report. His oral statement that he did not want to file an annual report and pay the license fee did not terminate his license prior to the anniversary date of the license.

As to selling without a license, respondent presents a fact for the first time on appeal which, if true, would seem to constitute a valid defense. Respondent states (Appeal at 1):

Sub Part A and B Correct as for number of pigs sold.

If you look at Animal Welfare Act (7 U.S.C. 2131-2156) Section 2 Sub Part f ii;

“any person who does not sell, or negotiate the purchase or sale of any wild animal, dog or cat and who derives no more than \$500 gross income from the sale of other animals during any calendar year”.

Being that I maintain a few pigs, along with my sons who have their own colonies each as 4-H projects for several years. So long as each of us stay below the \$500 limit there is no violation.

The complete definition of the term dealer, quoted in part by the respondent, is as follows (7 U.S.C. § 2132(f)):

(f) The term “dealer” means any person who, in commerce, for compensation or profit, delivers for transportation, or transports, except as a carrier, buys, or sells, or negotiates the purchase or sale of, (1) any dog or other animal whether alive or dead for research, teaching, exhibition, or use as a pet, or (2) any dog for hunting, security, or breeding purposes, except that this term does not include—

(i) a retail pet store except such store which sells any animals to a research facility, an exhibitor, or a dealer; or

(ii) any person who does not sell, or negotiate the purchase or sale of any wild animal, dog, or cat, and who derives no more than \$500 gross income from the sale of other animals during any calendar year.

If respondent had filed a timely answer setting forth as a defense that he was not a dealer on January 23, 1985, and February 5, 1985, when the alleged unlawful sales occurred, a hearing would have been held to determine the truth of that fact. But since respondent did not file a timely answer, and even in his late answer he did not choose to "set forth any explanation at this time," respondent cannot inject this issue into the case for the first time on appeal.

It should be noted that the complaint does not *expressly* allege that respondent was still a dealer on January 23, 1985, and February 5, 1985, when the alleged sales in violation of the Act occurred. But the fact that respondent was a dealer on those dates is alleged by implication. That is, the complaint alleges (Complaint at 2):

a. On January 23, 1985, respondent sold and shipped 38 guinea pigs to a research facility without an effective Animal Welfare License in violation of Section 4 of the Animal Welfare Act, 7 U.S.C. 2134.

b. On February 5, 1985, respondent sold and shipped 52 guinea pigs to a research facility without an effective Animal Welfare License in violation of Section 4 of the Animal Welfare Act, 7 U.S.C. 2134.

Since the complaint alleges that these sales were in violation of § 4 of the Animal Welfare Act (7 U.S.C. § 2134), and § 4 of the Act only applies to sales by dealers (or exhibitors subject to the Act), the complaint necessarily alleges, by implication, that respondent was acting as a dealer on those dates.

In addition, the complaint also alleges that respondent was licensed as a dealer from November 14, 1983, until January 15, 1985, just a few days prior to the sales alleged to be in violation of the Act. In the absence of any suggestion by respondent to the contrary, the ALJ could have properly inferred that when respondent continued to sell guinea pigs a few days after his license terminated, he was still acting as a dealer. But, in any event, as stated

above, it is too late for respondent to inject this issue into the case for the first time on appeal.

For the foregoing reasons, the following order should be issued.

ORDER

Respondent, his agents and employees, directly or indirectly through any corporate or other device, in connection with his business as a dealer within the meaning of the Act, shall cease and desist from:

1. Selling animals in violation of 7 U.S.C. § 2134; and
2. Refusing to permit inspections of his premises in violation of 7 U.S.C. § 2146(a) and 9 CFR § 2.126.

Respondent is assessed a civil penalty of \$3,000, which shall be paid not later than the 90th day after service of this order by certified check or money order, made payable to the order of the Treasurer of the United States and sent to Kevin F. Meckus, United States Department of Agriculture, Office of the General Counsel, Room 2014-South Building, Washington, D. C. 20250.

The cease and desist provisions of this order shall become effective on the day after service of this order on respondent.

In re: LETHA HAMILTON. AWA Docket No. 357. Decided March 10, 1986.

William Weber, Administrative Law Judge

Mary Kyle Hobbie, for complainant.

Robert W. Evenson, Pineville, Missouri, for respondent.

CONSENT DECISION AND ORDER

This proceeding was instituted under the Animal Welfare Act, as amended (7 U.S.C. § 2131 *et seq.*), by a complaint filed by the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture, alleging that the respondent violated the regulations and standards issued pursuant to the Act (9 CFR § 1.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondent admits the jurisdictional allegations in paragraphs 1 and 2 of the complaint and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

Respondent Letha Hamilton is an individual with a mailing address of Route 1, Box 162, Goodman, Missouri 64843. The respondent, at all times material herein was licensed as a Class A dealer within the meaning of the Act.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

1. The respondent shall cease and desist from violating the Act and the regulations and standards issued thereunder.

2. Respondent is assessed a civil penalty of \$1,000 of which all but \$250 is suspended conditional upon her compliance with the regulations and standards of the Animal Welfare Act and this Decision.

3. Respondent agrees to employ two part-time or one full-time employee who will be responsible for the maintenance of proper housekeeping and sanitation in the kennel in compliance with the standards and regulations issued pursuant to the Animal Welfare Act.

The provisions of this order shall become effective on the first day after service of this decision on the respondent.

Copies of this decision shall be served upon the parties.

re: BETTY L. AALSETH d/b/a LABPETS. AWA Docket No. 365. Decided March 10, 1986.

William J. Weber, Administrative Law Judge.

Robert Frisby, for complainant.

For respondent, *pro se*.

CONSENT DECISION

This proceeding was instituted under the Animal Welfare Act, as amended, 7 U.S.C. §§ 2131-2156, by a complaint filed by the Administrator, Animal and Plant Health Inspection Service (APHIS), United States Department of Agriculture, alleging that the respondent willfully violated the regulations and standards issued pursuant to the Act, 9 CFR § 1.1-3.142. This decision is entered

pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding, 7 CFR § 1.138.

The respondent admits the jurisdictional allegations in paragraph I of the complaint and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Respondent Betty L. Aalseth is an individual doing business as Labpets, and her mailing address is 89 South Backus Avenue, Pasadena, California, 91107.

2. At all times material herein, respondent was a dealer within the meaning of the Act and held a Class A license (No. 93A-123) issued pursuant to the Act.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent Betty L. Aalseth shall comply with each and every provision of the Animal Welfare Act, 7 U.S.C. §§ 2131-2156, and the regulations and standards issued thereunder, 9 CFR §§ 1.1-3.142, and shall cease and desist from any violation thereof.

Respondent is assessed a civil penalty of \$2000; such penalty to be suspended provided that she surrender her license (No. 93A-123) and refrain from operating in any capacity requiring a license under the Act for a period of three (3) years from the effective date of this decision. If, after notice and hearing, it is determined that respondent has operated in any capacity requiring a license under the Act during this three (3) year period, this \$2000 civil penalty shall become due. Respondent may apply for a new license three years from the effective date of this decision.

The provisions of this order shall become effective on the first day after service of this decision on the respondent.

Copies of this decision shall be served upon the parties.

In re: BRIAN WATSON d/b/a EAST COAST CAMEL CO. AWA Dock
No. 362. Decided March 28, 1986.

Dorothea A. Baker, Administrative Law Judge

Robert A. Ertman, for complainant.

Ralph C. Pino, Gloucester, Massachusetts, for respondent.

DECISION AND ORDER (CONSENT)

This proceeding was instituted under the Animal Welfare Act, as amended (7 U.S.C. § 2131 *et seq.*), by a complaint filed by the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture, alleging that the respondent violated the regulations and standards issued pursuant to the Act (49 CFR § 1.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

Respondent admits the jurisdictional allegations in paragraph 1 of the complaint and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

Complainant agrees to the entry of this decision.

FINDINGS OF FACT

Respondent Brian Watson is an individual doing business as East Coast Camel Co., at Pond Street, Essex, Massachusetts 01929. Respondent, at all times material herein, was licensed and operating as an exhibitor within the meaning of the Act.

CONCLUSIONS

Respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

1. Respondent shall cease and desist from violating the Act and the regulations and standards issued thereunder. In particular, respondent shall abide by the regulations and standards alleged to have been violated in the complaint filed in this proceeding. Further, respondent shall instruct his employees to grant entry to employees of the Animal and Plant Health Inspection Service for the inspection of his facilities, and shall provide responsible employees with the necessary keys and combinations to locks.

. Respondent is assessed a civil penalty of \$500.00, which shall be paid by a certified check or money order payable to the Treasurer of the United States.

. Respondent's license shall be suspended for a period of 60 days continuing until the respondent demonstrates to the Animal and Plant Health Inspection Service that he is in full compliance with the Act and the regulations and standards issued thereunder. When respondent demonstrates to the Animal and Plant Health Inspection Service that the respondent is in full compliance with the Act and the regulations and standards issued thereunder, a supplemental order will be issued upon the motion of the Animal and Plant Health Inspection Service in this proceeding terminating suspension.

The provisions of this order shall become effective February 13, 1968.

This decision has been served upon the parties and service has been accepted.

This decision and order became effective February 13, 1968.—
]

re: WAYNE ANDERSON. AWA Docket No. 297. Decided April 3, 1968.

Edward H. McGrail, Administrative Law Judge.
Robert A. Ertman, for complainant.
Respondent, *pro se*.

CONSENT DECISION AND ORDER

This proceeding was instituted under the Animal Welfare Act, as amended (7 U.S.C. § 2131 *et seq.*), ("Act") by a Complaint filed by the Administrator, Animal and Plant Health Inspection Service (APHIS), United States Department of Agriculture, charging that respondent violated the regulations and standards issued under the Act (9 CFR § 1.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to these proceedings (7 CFR § 1.138).

The respondent admits the jurisdictional allegations contained in the complaint, specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, and waives oral hearing and further procedure. Complainant and respondent agree for the purpose of settling this proceeding to the entry of this decision.

FINDINGS OF FACT

1. Respondent is an individual whose mailing address is Route 2 Richland Center, WI 53581.
2. At all times material herein respondent was licensed as a dealer under the Act.

CONCLUSION

Respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this decision and order, this decision and order will be entered.

ORDER

1. Respondent shall comply with each and every provision of the Animal Welfare Act (7 U.S.C. § 2131 *et seq.*) and the standards and regulations issued thereunder (9 CFR § 1.1 *et seq.*) and shall cease and desist from any violation thereof, and in particular shall not transport dogs or cats except in approved primary enclosures and shall not place more than the approved number of animals in each primary enclosure.

2. Respondent is assessed a civil penalty of \$100.

This order shall have the same force and effect as if entered after full hearing and shall become effective on the first day after service of this Decision and Order on the respondent.

In re: JAMES E. HEASLEY and EARLA M. HEASLEY. AWA Docket No. 325. Decided April 9, 1986.

Victor W. Palmer, Administrative Law Judge.

Robert Frisby, for complainant

For respondent, *pro se*.

DECISION (CONSENT)

This proceeding was instituted under the Animal Welfare Act, as amended, 7 U.S.C. §§ 2131-2156, by a complaint filed by the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture, alleging that the respondent willfully violated the regulations issued pursuant to the Act, 9 CFR §§ 1.1-2.130. This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding, 7 CFR § 1.138.

The respondents admit the jurisdictional allegations of the complaint and specifically admit that the Secretary has jurisdiction in this matter, neither admit nor deny the remaining allegations,

waive oral hearing and further procedure, and consent and agree, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. James E. Heasley and Earla M. Heasley, hereinafter referred to as the respondents, are partners doing business as Heasley's Trading Post. Their mailing address is R.D. 1, Lewis Run, Pennsylvania 16738.

2. Respondents, at all times material herein, were engaged in business as an exhibitor as defined in the Act but did not hold a license as required by the Act.

CONCLUSIONS

The respondents having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondents James E. Heasley and Earla M. Heasley shall comply with each and every provision of the Animal Welfare Act, 7 U.S.C. §§ 2131-2156, and the regulations and standards issued thereunder, 9 CFR §§ 1.1-3.142, and shall cease and desist from any violation thereof. In particular, respondents shall cease and desist from engaging in any business requiring a license under the Act without first obtaining a license as required by the Act and the regulations.

Respondents are hereby assessed a civil penalty of \$300 to be paid by certified check or money order made payable to the Treasurer of the United States.

The provisions of this order shall become effective on the first day after service of this decision on the respondent.

Copies of this decision shall be served upon the parties.

In re: DORA M. DORRIS. AWA Docket No. 350. Decided April 1986.

Victor W. Palmer, Administrative Law Judge

Kevin F. Meckus, for complainant.

For respondent, pro se.

CONSENT DECISION AND ORDER

This proceeding was instituted under the Animal Welfare Act, amended, 7 U.S.C. §§ 2131-2156 (1982), by a complaint filed by the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture, alleging that the respondent willfully violated the regulations and standards issued pursuant to the Act, 9 CFR §§ 1.1-3.142. This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to these proceedings, 7 CFR § 1.138.

The respondent admits the jurisdictional allegations of the complaint and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents to and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Dora M. Dorris, hereinafter referred to as respondent, is an individual whose mailing address is R.2, Norwalk, Iowa 50211.
2. At all times material herein respondent was licensed under the Act as a Class A dealer (License No. 42ABA).

CONCLUSION

The respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent Dora M. Dorris shall comply with each and every provision of the Animal Welfare Act, 7 U.S.C. §§ 2131-2156, and the regulations and standards issued thereunder, 9 CFR §§ 1.1-3.142, and shall cease and desist from any violation thereof.

Respondent is hereby assessed a civil penalty of \$1,000.00. Of that amount, \$500.00 is to be paid by certified check or money order made payable to the Treasurer of the United States. The balance of the civil penalty is hereby suspended pending respondent's

future compliance with the Animal Welfare Act and the regulations and standards issued thereunder.

The provisions of this order shall become effective on the first day after service of this decision on the respondent.

Copies of this decision shall be served upon the parties.

In re: REX A. BANTZ. AWA Docket No. 199. Decided April 4, 1986.

Dorothea A. Baker, Administrative Law Judge.

Robert Frisby, for complainant

For respondent, *pro se*.

ORDER OF DISMISSAL

Complainant has moved to dismiss the complaint initiating this proceeding because it would not be in the public interest to pursue the matter any further.

WHEREFORE: for good cause shown, it is ordered that the complaint filed April 15, 1982, be dismissed.

In re: RUDOLPH VRANA d/b/a VRANA RESEARCH ANIMALS, AWA
Docket No. 380. Order issued April 25, 1986.

Edward H McGrail, Administrative Law Judge.

Howard Haas, for complainant.

Pro se, for respondent

ORDER OF DISMISSAL

The complainant moves to dismiss this case on the basis that further proceedings would not be in the public interest.

WHEREFORE: FOR GOOD CAUSE SHOWN, it is hereby ordered that this complaint is dismissed without prejudice.

In re: DEAN PAUL. AWA Docket No. 360. Order issued April 2, 1986.

Donald A. Campbell, Judicial Officer.

Kevin Meckus, for complainant.

Valerie L. Marciano, Green Bay, Wisconsin, for respondent

ORDER DENYING PETITION FOR RECONSIDERATION

Respondent's petition for reconsideration is denied for the reasons set forth in the Decision and Order filed March 6, 1986. The cease and desist provisions of the order filed March 6, 1986, shall become effective on the day after service of this order on respondent, and the civil penalty shall be paid not later than the 90th day after service of this order on respondent.

In re: S. MARCHISIO PROVISION, INC. FMIA Docket No. 94. Decided March 5, 1986.

Dorothea A Baker, Administrative Law Judge.

Kris Ikejiri, for complainant

William Condon, New York, N.Y., for respondent

STIPULATION AND CONSENT DECISION AND ORDER

This is a proceeding under the Federal Meat Inspection Act (FMIA), as amended (21 U.S.C. Section 601 *et seq.*), and the applicable Rules of Practice (7 CFR Section 1.130 *et seq.* and 9 CFR Section 335.1 *et seq.*), to withdraw Federal meat inspection service from S. Marchisio Provision, Inc. This proceeding was commenced by a complaint filed on October 2, 1985, by the Administrator of the Food Safety and Inspection Service (FSIS), United States Department of Agriculture (USDA), who is responsible for the administration of Federal meat inspection services. The parties have agreed that this proceeding should be terminated by the entry of the Consent Decision set forth below and have agreed to the following stipulations:

1. For purposes of this stipulation and the provisions of this Consent Decision only, S. Marchisio Provision, Inc., hereafter referred to as respondent, admits all of the jurisdictional allegations of the complaint, and waives:

(a) Any further procedural steps;

(b) Any requirement that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law or discretion, as well as the reasons or bases thereof; and

(c) All rights to seek judicial review or to otherwise challenge or contest the validity of this decision.

2. This Stipulation and Consent Decision are for settlement purposes in this proceeding only and do not otherwise constitute an admission or denial by the respondent that it violated the regulations or statutes involved.

3. The respondent waives any action against the USDA under the Equal Access to Justice Act of 1980, (5 U.S.C. Section 504 *et seq.*) for fees and other expenses incurred by the respondent in connection with this proceeding.

FINDINGS OF FACT

1. Respondent is now, and at all times material herein was, a corporation which operates a meat processing establishment in Brooklyn, New York, and is a recipient of Federal meat inspection serv-

ices under Title I of the FMIA. The respondents address is 5 Brooklyn Terminal Market, Brooklyn, New York 11236.

2. On July 31, 1985, in the United States District Court for the Eastern District of New York, the respondent was convicted of two misdemeanors for the sale of adulterated and misbranded meat food products, in violation of Title 21, United States Code, Section 610(c).

CONCLUSIONS

Inasmuch as the parties have agreed to the provisions set forth in the following Consent Decision in disposition of this proceeding, such Order will be issued.

ORDER

I

Inspection service under Title I of the FMIA is, for a period of one year, withdrawn from and denied to respondent, its officers, directors, partners, affiliates, successors, and assigns, directly or through any corporate device. This one year period of withdrawal and denial will be held in abeyance, and will not become effective:

II

1. (a) For so long as, within one year from the effective date of this Order, the respondent or any of its officers, partners, employees, agents, or affiliates do not violate (as that term is defined in paragraph 1(b)) any section of the FMIA or State or local statutes involving the preparation, sale, transportation or attempted distribution of any adulterated or misbranded meat or meat food products.

(b) The term violate, as used in paragraph 1(a) above, means a violation found upon conviction (or upon affirmation of conviction, if appealed), or upon a final decision in a formal adjudicatory proceeding before the Secretary (or upon affirmation of the Secretary's decision, if appealed), and if it is found that there is any such violation of any term of this Order, the suspension of the withdrawal and denial will become effective immediately. This shall not preclude the referral of any such violation to the Department of Justice for possible criminal or civil proceedings.

III

1. For so long as, within five years of the effective date of this order, the conditions set forth in paragraphs 2 through 14 below, are met. During this five year period, the Secretary shall have the right to summarily withdraw inspection service upon a finding by

appropriate national headquarters staff, after a preliminary conference with respondent, of a violation of any special condition set in paragraphs 2 through 14. The summary withdrawal of inspection service shall be effective pending final determination of a violation in accordance with the applicable Rules of Practice. Such summary withdrawal shall have no relevance with respect to the determination in the proceeding and will not preclude the respondent from requesting an expedited hearing.

Respondent does not knowingly employ or add any individual who has been convicted, in any Federal or State court of any crime, or more than one violation of any law, other than a felony, upon the acquiring, handling, or distribution of unwholesome, mislabeled or deceptively packaged food, or fraud in connection with transactions in food; and

Respondent immediately terminates its connection with any individual when that individual's conviction becomes known;

Respondent does not prepare, manufacture, handle, sell or transport any sausage product which contains any prohibited or disapproved additive or any approved additive in excess of that allowed; and

Respondent maintains a complete listing of all nonmeat additives being used or stored at its official establishment, to include the identity of manufacturer and/or supplier; and

Respondent arranges for semiannual independent laboratory analysis of all additives being used or stored at the establishment of preservatives, including but not limited to sulfite, nitrite, ascorbate, and benzoate. The results of the analyses will be provided to the on-site USDA inspector; and

Respondent shall designate a full-time person who has overall responsibility and control of respondent's operations (i.e., manager or plant superintendent) to conduct daily reviews of areas of the official establishment for sanitation. In addition, Designee shall review daily products for condition, processing procedures, formulation, and labeling of finished products. These reviews shall be recorded in a hardbound Log Book, including but not limited to, the date, time, name of Designee conducting the review, the findings, suggestions and/or corrective action taken, initialed by the Designee. The Log Book shall be available for review by USDA personnel; and

Respondent's Designee shall immediately notify the USDA on-site inspector of any operational or sanitation deficiencies that exist or have caused work stoppage and corrective actions taken during the daily reviews; and

9. Respondent does not prepare, handle, or store custom excise articles or game, whether for customers, employees, the owner, friends or relatives; and

10. Respondent does not accept or receive any returned product due to its condition or the condition of the carton or container without prior notice to, and approval by, the on-site USDA inspector; and

11. Respondent does not handle, prepare, separate, wash, trim, recondition, or rework any returned or off-condition product without prior notice to, and approval by, the on-site USDA inspector and

12. Respondent maintains full, complete, and accurate written records of all other business activities applicable to the FMIA and the Poultry Products Inspection Act (21 U.S.C. Section 451 *et seq.*) which are available for review by USDA personnel; and

13. Respondent makes a detailed semiannual written report to the Meat and Poultry Inspection Office's Area Supervisor, New York, New York, concerning its adherence to this Stipulation and Consent Decision with a copy to the on-site USDA inspector. The first such report is due July 1, 1986. All following semiannual written reports shall be submitted to the Area Supervisor on June and December 1 of each calendar year that this Consent Decision and Order is effective; and

14. Respondent shall afford duly authorized personnel of the USDA an opportunity to examine and to copy all such records, reports, and other documents required of the respondent in this Consent Decision and Order.

15. Nothing in this Order shall preclude the respondent from petitioning the complainant, after 30 months from the effective date of this Order and after successfully complying with all terms of this Order, to modify, amend, or terminate any or all of the specific conditions set forth in paragraphs III, 1 through 14.

16. Nothing in this Order shall preclude the respondent from petitioning the complainant, at any time, to modify, amend or terminate this Order if the respondent has entered into good faith negotiations to sell or transfer the assets or corporate entity of the respondent.

This Consent Decision and Order shall become effective after being signed by an Administrative Law Judge and filed with the Hearing Clerk.

In re: TOSCONY PROVISION COMPANY, INC. FMIA Docket No. 40.
Order issued March 18, 1986.

Donald A Campbell, Judicial Officer.

Harold Reaben, for complainant.

Jon Alex Brody, Lyndhurst, New Jersey, for respondent.

**ORDER DENYING PETITION FOR RECONSIDERATION AND EXTENSION OF
TIME**

Respondent's petition for reconsideration is denied since it was not filed within 10 days after the date of service of the Judicial Officer's decision in this case (7 CFR § 1.146(a)(3)). If the matter had been timely filed, it would have been denied on the merits.

Respondent's motion for a 3-month extension of the deadline for Henry Dei to disassociate himself from respondent is denied since he knew since the date of service of the court of appeals decision that he would have to comply with the administrative order, and the case has been pending for years.

DISCIPLINARY DECISIONS

In re: DAVID MULSO, DAVE MULSO CATTLE COMPANY, SIRLOIN, INC.
ELKTON LIVESTOCK, INC., and WESLEY VAN DYKE. P&S Docket
No. 6487. Decided March 3, 1986.

William J. Weber, Administrative Law Judge.

Peter Train, for complainant.

For respondent, *pro se*

CONSENT DECISION AS TO RESPONDENTS ELKTON LIVESTOCK, INC., AND
WESLEY VAN DYKE

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*), by a Complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondents willfully violated the Act and the regulations issued thereunder (9 CFR § 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

Respondents Elkton Livestock, Inc., and Wesley Van Dyke, admit the jurisdictional allegations in paragraph II of the Complaint and specifically admit that the Secretary has jurisdiction in this matter, neither admit nor deny the remaining allegations, waive oral hearing and further procedure, and consent and agree, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Elkton Livestock, Inc., hereinafter referred to as respondent Elkton, is a corporation whose business address is R.R. 1, Box 54, Elkton, South Dakota 57026.

2. Respondent Elkton was, at all times material herein:

(a) Engaged in the business of buying and selling livestock in commerce for its own account, and buying livestock in commerce on a commission basis; and

(b) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce for its own account.

3. Wesley Van Dyke, hereinafter referred to as respondent Van Dyke, is an individual whose mailing address is R.R. 1, Box 54, Elkton, South Dakota 57026.

4. Respondent Van Dyke was, at all times material herein:

(a) Owner of all the corporate stock of respondent Elkton;

(b) President of respondent Elkton; and

(c) Responsible for the direction, management, and control of respondent Elkton.

5. Respondent Van Dyke was, at all times material herein, a dealer and market agency within the meaning of those terms as defined in the Act, and subject to the provisions of the Act.

CONCLUSIONS

Respondents Elkton Livestock, Inc., and Wesley Van Dyke having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondents Elkton Livestock, Inc., and Wesley Van Dyke, their agents and employees, directly or through any corporate or other device, shall cease and desist from:

1. Misrepresenting to their principals, or to other purchasers of livestock from respondents, the original purchase weights or the original purchase prices for such livestock;

2. Preparing and issuing, or causing to be prepared and issued, in connection with the purchase or sale of livestock, accounts of purchase, invoices, billings, or any other document showing false, inaccurate or misleading weight or price entries for such livestock;

3. Collecting payment from the purchasers of livestock on the basis of false, inaccurate, or misleading weight or price entries on accounts of purchase, invoices or billings;

4. Inserting or failing to insert in accounts of purchase, invoices, billings or any other document prepared in connection with the purchase or sale of livestock, any entry, statement or information by reason of which insertion or omission a false or misleading record is made, in whole or in part, of such livestock purchase or sale transaction;

5. Issuing checks in payment for the purchase of livestock without having and maintaining sufficient funds on deposit and available in the bank account upon which the checks are drawn to pay the checks when presented;

6. Failing to pay, when due, the full purchase price of livestock;

7. Failing to pay for livestock; and

8. Engaging in business in any capacity for which bonding is required under the Packers and Stockyards Act, as amended and supplemented, and the regulations, without filing and maintaining a reasonable bond or its equivalent, as required by the Act and regulations.

Respondent Elkton Livestock, Inc., is suspended as a registrant under the Act for a period of one year and thereafter until such time as it complies fully with the bonding requirements under the Act and regulations. When respondent Elkton demonstrates that it is in full compliance with such bonding requirements, a supplemental order will be issued in this proceeding terminating this suspension after the expiration of the one-year period.

Respondent Wesley Van Dyke shall not engage in business as a market agency or dealer subject to the Act for a period of one year.

The provisions of this order shall become effective on the sixth day after service of this order on the respondents.

In re: GREENVILLE LIVESTOCK, INC., and W. BRYAN HARGETT, Jr.
P&S Docket No. 6556. Decided March 3, 1986.

John A. Campbell, Administrative Law Judge.

Ben Bruner, for complainant.

Louis Foy, Trenton, North Carolina, for respondent.

CONSENT DECISION

This proceeding was instituted under the Packers and Stockyard Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondents wilfully violated the Act and the regulations issued thereunder (9 CFR § 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondents admit the jurisdictional allegations in paragraph I of the complaint and specifically admit that the Secretary has jurisdiction in this matter, neither admit nor deny the remaining allegations, waive oral hearing and further procedure, and consent and agree, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Respondent Greenville Livestock, Inc., doing business as East Carolina Stockyard, hereinafter referred to as the corporate respondent, is a North Carolina corporation. The corporate respondent's principal place of business is located at Ayden-Grifton, North Carolina, and its business mailing address is P. O. Box 833, Kingston, North Carolina 28501.

the corporate respondent is, and at all times material herein

Engaged in the business of conducting and operating the Carolina stockyard, a stockyard posted under and subject to provisions of the Act, hereinafter referred to as the stockyard;

Engaged in the business of a market agency buying and livestock in commerce on a commission basis;

Engaged in the business of a dealer buying and selling livestock in commerce for its own account; and

Registered with the Secretary of Agriculture as a market to buy and sell livestock in commerce on a commission and as a dealer to buy and sell livestock in commerce for its account.

Bryan Hargett, Jr., hereinafter referred to as the individual respondent, is an individual whose business mailing address is Box 833, Kinston, North Carolina 28501.

The individual respondent is, and at all times material herein

President of the corporate respondent;

Owner of 100% of the outstanding stock issued by the corporate respondent;

Responsible for the direction, management and control of the corporate respondent; and

A market agency and dealer within the meaning of those as defined in the Act and subject to the provisions of the Act.

CONCLUSIONS

respondents having admitted the jurisdictional facts and the respondents having agreed to the entry of this decision, such decision entered.

ORDER

Respondent Greenville Livestock, Inc., its officers, directors, and employees, successors and assigns, and respondent W. Hargett, Jr., his agents and employees, directly or through corporate or other device, in connection with their activities subject to the Packers and Stockyards Act, shall cease and desist

Failing to deposit in their Custodial Account for Shippers' Funds, within the specific times prescribed in section 201.42(c) of the Regulations (9 CFR § 201.42(c)), an amount equal to the proceeds receivable from the sale of consigned livestock whether or not such proceeds have been collected by respondents; and

2. Failing to otherwise maintain their Custodial Account Shippers' Proceeds in strict conformity with the provisions of 201.42 of the regulations (9 CFR § 201.42).

The corporate respondent is suspended as a registrant under the Act, and the individual respondent is prohibited from engaging in business subject to the Act for a period of seven (7) days and thereafter until they demonstrate that the shortage in the corporate respondent's Custodial Account for Shippers' Proceeds has been eliminated. When respondents demonstrate that the shortage in the Custodial Account for Shippers' Proceeds has been eliminated, a supplemental order will be issued in this proceeding terminating the suspension and prohibition after the expiration of the seven day period.

In accordance with section 312(b) of the Act (7 U.S.C. § 213(b)), respondents are jointly and severally assessed a civil penalty in the amount of Ten Thousand Dollars (\$10,000.00).

The provisions of this order shall become effective on February 23, 1986.

Copies of this decision shall be served on the parties.

In re: ROBERT HIBBERD, P&S Docket No. 6661. Decided March 1986.

Victor W. Palmer, Administrative Law Judge

Edward M. Silvestein, for complainant.

For respondent, pro se

CONSENT DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondent wilfully violated the Act and the regulations issued thereunder (9 CFR § 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondent admits the jurisdictional allegations in paragraph I of the complaint and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further proceedings and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Robert Hibberd, hereinafter referred to as the respondent, is an individual whose business mailing address is Valley View Trailer Park # 192, Kearney, Nebraska 68847.

2. Respondent is, and at all times material herein was:

(a) Engaged in the business of a market agency buying livestock in commerce on a commission basis; and

(b) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce for his own account and as a market agency to buy livestock in commerce on a commission basis.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent Robert Hibberd, his agents and employees, directly or through any corporate or other device, shall cease and desist from engaging in business in any capacity for which bonding is required under the Packers and Stockyards Act, as amended and supplemented, and the regulations, without filing and maintaining a reasonable bond or its equivalent, as required by the Act and the regulations.

Respondent is suspended as a registrant under the Act until such time as he complies fully with the bonding requirements under the Act and the regulations. When respondent demonstrates that he is in full compliance with such bonding requirements, a supplemental order will be issued in this proceeding terminating this suspension.

In accordance with section 312(b) of the Act (7 U.S.C. § 213(b)), respondent is assessed a civil penalty in the amount of Five Hundred Dollars (\$500.00).

The provisions of this order shall become effective on the sixth day after service of this order on the respondent.

Copies of this decision shall be served upon the parties.

In re: BLACKFOOT LIVESTOCK COMMISSION Co. P&S Docket No. 61'
Decided March 7, 1986.

Misuse of custodial account—Check kiting—Six-month suspension until custodial account is no longer insolvent.

The Judicial Officer affirmed Judge Weber's decision requiring respondent to cease and desist from engaging in business while insolvent, misusing its custodial account for shippers' proceeds; exchanging drafts or checks to create a false "float" in its account; permitting owners, etc., to buy out of consignment for speculation; and paying for livestock with a draft which is not a check without permission from the seller. However, the Judicial Officer *sua sponte* increased the suspension period from 35 days, which was requested by complainant and issued by the ALJ, to 6 months, primarily because of the seriousness of the check-kiting violations. The fact that the principal violator is now deceased is not a mitigating circumstance. A principal is responsible for the acts of its agents. Check kiting is serious because of potential for great harm. Severe sanction policy explained. Although complainant advised respondent prior to the hearing that it was seeking a 35-day suspension order, respondent should know that that is only a recommendation not binding on the Judicial Officer. Where previous sanctions have not been adequate, a more severe sanction is issued in the present case rather than merely an announcement that in future cases the sanction will be increased. Harm to consignors is not considered in determining the sanction against an auction market. Consent decision given no weight in determining sanctions in litigated cases. Complainant's investigation report is not producible under Jencks Act, and respondent's request for the report does not require the ALJ to perform an *in camera* examination.

William J. Weber, Administrative Law Judge.

Peter Train, for complainant.

Robert M. Cook, Norfolk, Nebraska, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 et seq.).* An initial Decision and Order was filed on August 22, 1985, by Administrative Law Judge William J. Weber (ALJ) suspending respondent as a registrant for 35 days and ordering respondent to cease and desist from engaging in business while insolvent; misusing its "Custodial Account for Shippers' Proceeds"; exchanging drafts or checks to create a false "float" or balance in its account; permitting owners, officers, agents, or employees to buy livestock out of consignment for speculation; and paying for livestock with a draft which is not a check without obtaining permission from the seller.

* See generally Campbell, "The Packers and Stockyards Act Regulatory Program," in 1 Davidson, *Agricultural Law*, ch. 3 (1981 and Aug. 1985 Supp.), and Carter, "Packers and Stockyards Act," in 10 Harl, *Agricultural Law*, ch. 71 (1987).

On September 23, 1985, respondent appealed to the Judicial Officer to whom final administrative authority to decide the Department's cases subject to 5 U.S.C. §§ 556 and 557 has been delegated (9 CFR § 2.35).** On October 21, 1985, the case was referred to the Judicial Officer for decision. The Judicial Officer *sua sponte* raised the issue as to whether the suspension period should be "substantially increased, e.g., 6 months to a year" (Notice filed January 31, 1986). Additional briefs were filed by the parties.

Oral argument before the Judicial Officer, which is discretionary (9 CFR § 1.145(d)), was requested by respondent, but is denied inasmuch as the issues are not novel or difficult, the case has been thoroughly briefed, and oral argument would seem to serve no useful purpose.

Based upon a careful consideration of the record, the ALJ's findings and conclusions are adopted as the final decision in this case, which changes too minor to itemize (except that a paragraph is omitted which begins at the bottom of page 24 of the ALJ's decision). Additional conclusions by the Judicial Officer follow the ALJ's conclusions. The suspension period is increased to 6 months for the reasons set forth in the Judicial Officer's additional conclusions.

ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 USC § 181 *et seq.*, *et al.*) instituted by a complaint filed on March 1 1983.

Generally, the complaint alleged respondent violated the provisions of the Act (and implementing regulations 9 CFR 200 *et seq.*) concerning insolvency, misuse of the custodial account, paying for livestock with drafts (without written permission from the seller), check-kiting and speculative purchases of cattle consigned for sale. Specifically, the complaint charged respondent corporation willfully violated the Act by exchanging checks or drafts with Uinta Livestock Commission Company when no sales of livestock were involved, for the purpose of creating a false "float" or balance in bank accounts. The complaint also charged that there were in-

* The position of Judicial Officer was established pursuant to the Act of April 4, 1946 (7 U.S.C. §§ 450c-450g), and Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3 (1953), reprinted in 5 U.S.C. app. at 1068 (1982). The Department's present Judicial Officer was appointed in January 1971, having been involved with the Department's regulatory programs since 1949 (including 3 years' trial litigation; 10 years' appellate litigation relating to appeals from the decisions of the prior Judicial Officer and 8 years as administrator of the Packers and Stockyards Act regulatory program (December 1962-January 1971)).

12. As of December 31 1981, respondent's current liabilities exceeded its current assets. As of that date, respondent had current liabilities of approximately \$474,979.00, and current assets totalling approximately \$308,760.00, resulting in a deficit of approximately \$166,219.00. (CX 10; TR 51-71)

13. A financial statement prepared by respondent's accountant showed that as of December 31, 1981, respondent's current liabilities exceeded its current assets by approximately \$192,974.00, an amount even greater than that alleged by complainant. (CX 9) The figures in both CX 9 and CX 10 demonstrate that respondent's current liabilities exceeded its current assets as of December 31 1981.

14. While insolvent, Respondent operated as a market agency subject to the Act between October 31 and December 31 1981.

Custodial Account

15. Respondent, between March 30 and February 26 1982, failed to maintain its Custodial Account for Shippers' Proceeds ("custodial account") in accordance with the regulations promulgated under the Packers and Stockyards Act, in that:

(a) As of March 30, 1981, respondent had outstanding checks drawn on its custodial account in the amount of \$318,825.89, and had, to offset those checks, cash in said account in the amount of \$145,384.32, deposits in transit of \$2,842.70, and proceeds receivable of \$28,023.30, resulting in a deficiency of \$142,575.57 in funds available to pay shippers their proceeds. (CX 11; TR 78-85)

(b) As of April 30 1981, respondent had outstanding checks drawn on its custodial account in the amount of \$296,715.58, and had, to offset those checks, cash in said account in the amount of \$276,056.40, no deposits in transit and no proceeds receivable, resulting in a deficiency of \$20,659.18 in funds available to pay shippers their proceeds. (CX 12; TR 86-88)

(c) As of October 31 1981, respondent had outstanding checks drawn on its custodial account in the amount of \$922,347.50, and had, to offset those checks, cash in said account in the amount of \$193,366.60, deposits in transit of \$97,038.28, and proceeds receivable of \$611,189.77, resulting in a deficiency of \$20,752.85 in funds available to pay shippers their proceeds. (CX 8; TR 36-40)

(d) As of December 31 1981, respondent had outstanding checks drawn on its custodial account in the amount of \$102,044.95, and had, to offset those checks, cash in said account in the amount of \$83,457.07, no deposits in transit and no proceeds receivable, resulting in a deficiency of \$18,587.88 in funds available to pay shippers their proceeds. (CX 10; TR 63-66)

16. An analysis of the custodial account for April 1981 revealed that the outstanding checks drawn on the custodial account exceeded the ending bank balance for each and every day in April. (CX 13; TR 141-48)

17. The shortages were caused in part by the failure of respondent to deposit in its custodial account, within the respective times prescribed by the regulations (1) an amount equal to the proceeds from purchases of consigned livestock by Dennis Lake and Delwyn Ellis, respondent's owners and officers; and (2) an amount equal to the proceeds receivable from purchases of consigned livestock by others. (CX 8, 10-12; TR 153-155)

18. The deficiencies in the custodial account were also caused by respondent's deposit to its general account of monies which should properly have been deposited immediately in its custodial account. It was common practice for respondent to deposit proceeds from the sale of consigned livestock received on the Monday and Tuesday following the Friday sale in its general account rather than the custodial account. Between March 6 and May 29 1981, respondent had as much as \$284,899.84 in its general account which should properly have been deposited in its custodial account. For the period December 11 1981 through February 19 1982 as much as \$189,398.14 of consignors' money was in respondent's general account rather than its custodial account. (CX 14, 15, 16; TR 149-166)

Check-kiting

19. Uinta Livestock Commission Company, Roosevelt, Utah, was, at the time relevant here (from January 1 1981 through May 27 1981), a market agency which conducted weekly auction sales, and also purchased and sold livestock for its own account. (CX 178; TR 353)

20. Mr. Kay Andreasen, 907 Paulsen, Moses Lake, Washington 98837, was at the time material here, the owner of Uinta Livestock Commission Co.

21. Ms. Carol Kimball, Hancock Cove, Roosevelt, Utah, at the time relevant here, (from January 1 1981 through May 27 1981), was the bookkeeper and office manager of Uinta Livestock Commission Company. In that capacity she issued Uinta checks made payable to Blackfoot Livestock Commission Company totalling \$8,697,664.44. (CX 17A; TR 307)

22. Ms. Kimball was also authorized by Paul Thompson (then Vice-President of Blackfoot Livestock) to sign Blackfoot Livestock Commission Company drafts made payable to Uinta Livestock Commission Company. (TR 314)

23. Between January 1 1981 and May 20 1981 more than 75 separate drafts totalling \$8,629,649.58, payable to Uinta Livestock Commission Company, were drawn on Blackfoot's account. The overwhelming majority of those drafts were signed by Ms. Kimball. (CX 17A)

24. Many of these Blackfoot drafts were issued to cover Uinta's overdrafts in its account at Zions First National Bank, Roosevelt, Utah. Uinta's account was in an overdraft position on an almost daily basis.³ (TR 309, 310)

25. An analysis of the Blackfoot drafts in CX 17B reveals that some have names and figures which purport to be true purchases of livestock while others contain no information as to the number of head, or weight or price. Many of the names and figures on the drafts were fictitious, placed on the drafts of Blackfoot Livestock to make them appear to be legitimate transactions at the request of Paul Thompson, who was then Vice-President of Blackfoot. (TR 312-27)

26. When a Blackfoot draft made payable to Uinta was issued, an exchange check payable to Blackfoot was issued by Ms. Kimball within minutes after writing the Blackfoot drafts. (TR 313)

27. At the time the Uinta checks given in exchange for Blackfoot drafts were issued, there were not sufficient funds in Uinta's account to cover such checks. (CX 18A; TR 279-285)

28. At the time Blackfoot drafts were issued and deposited by Uinta in Uinta's bank account, there were not sufficient funds in Blackfoot's account to cover such drafts. (CX 18B; TR 285-293)

29. Prior to a Uinta exchange check being presented for payment at its bank, another Blackfoot draft would be deposited and credited to Uinta's bank. The reverse was also true, i.e., a Uinta check would be deposited and credited to Blackfoot's account prior to a Blackfoot exchange draft being presented for payment. (TR 277-278)

³ Zions First National Bank allowed Uinta provisional use of the funds on deposit of the Blackfoot Livestock drafts, before Blackfoot Livestock, as drawee, had "accepted" the drafts for payment

After the death of Paul Thompson, Uinta officials were told that the relationship with Blackfoot Livestock would continue. (TR 336, 346-47). But almost immediately thereafter, apparently when Blackfoot Livestock officers discovered the full extent of that relationship, Blackfoot Livestock officers refused to accept for payment any further drafts payable to Uinta.

This resulted in a loss of about \$884,000.00 by Zions First National Bank which had allowed provisional use of these funds to Uinta on deposit of the drafts. (Findings of Fact 14 through 19, decision of the District Court, *Zions First National Bank v. Blackfoot Livestock*, *supra*).

30. The purpose and effect of this exchange was to create an artificial balance in both Blackfoot's and Uinta's account such that there appeared to be sufficient funds in the accounts when in fact these funds were merely "paper" money. (TR 371, 372)

31. A representative sampling of these checks and drafts appears in paragraph VII of the complaint (with minor typographical errors).

32. Dennis Lake was aware that a large number of Blackfoot drafts for large sums of money were being issued to Uinta Livestock at least as early as April, 1981. (TR 324, 312-314)

33. In late May, after the death of Paul Thompson, Dennis Lake refused to honor three Blackfoot drafts totalling \$884,108.61 issued to Uinta even though Blackfoot had received and deposited a check for \$84,688.94 issued by Uinta in exchange for the first of these drafts. (CX 17A; TR 369, 347)

*Speculative Purchases by Respondent's Officers and Failure to
Timely Deposit Funds in the Custodial Account*

34. During the period November 6 1981 through February 26 1982, Dennis Lake and Delwyn Ellis purchased, purportedly in the name of Blackfoot, livestock which had been consigned to Blackfoot Livestock Commission Co., for sale on commission basis (detailed in paragraph VIII of the complaint).

35. In purchasing these livestock, Lake and Ellis actively competed with other bidders. (TR 663)

36. Separate "deal sheets," that is, documents which show the details of the purchase of livestock by Lake and Ellis, including the number, weight and price on the top half of the sheet, and its subsequent resale to include the purchaser, the number, weight and price on the bottom half of the sheet, were kept for Lake and Ellis. (CX 20; TR 438, 750)

37. On virtually every deal sheet, there was a figure in the center of the sheet on the bottom which represented the difference between the price paid for the livestock at the top and the price purportedly received from the subsequent resale of these livestock, i.e., gross profit. (CX 20; TR 440, 446)

38. Certain of the livestock purchased from consignment by Lake and Ellis in the name of Blackfoot were sold to Dennis Lake and Delwyn Ellis for their ranching or feeding operations. These purchases were not paid for by the close of business on the day following the sale. (TR 756-64; CX 20)

39. The percentage of livestock purchased out of consignment by Blackfoot ranged from a low of 3% on December 18 1981, to highs

of 28% on February 5 1982; 25% on February 12 1982; and 21% on February 19 1982. (CX 20A)

40. Although Lake and Ellis did not make a profit on the resale of their purchases out of consignment on every sale day, significant profits were made on most days. (CX 20A) These purchases were made with the hope and intention of making a profit on resale.

41. Lake and Ellis knew, prior to the Friday sale, the kind and quality of most of the livestock which was being consigned to their market for that sale. (TR 659, 788)

42. Dennis Lake and Joe Shrader had conversations every Friday morning prior to the Blackfoot sale concerning the heifers being consigned, the market and price for heifers in Colorado. (TR 518-519)

43. After the sale, Dennis Lake called Shrader and offered the livestock to Shrader. Shrader, in fact, purchased many heifers from Lake. (CX 20; TR 521)

Unauthorized Use of Drafts

44. Blackfoot issued bank drafts in payment for its purchases of livestock without prior written permission from the sellers. (CX 21; TR 463-464)

DISCUSSION AND CONCLUSIONS

I

Respondent Wilfully Violated The Act By Operating As A Market Agency While Its Current Liabilities Exceeded Its Current Assets

7 USC § 204 provides, in part, that “. . . whenever, after due notice and hearing, the Secretary finds any registrant is insolvent, he may issue an order suspending such registrant for a reasonable specified period.”

In the absence of a statutory definition of solvency, the Secretary has adopted the test of insolvency as being whether current liabilities exceed current assets. If a registrant's current liabilities exceed its current assets, it is deemed to be insolvent. (9 CFR § 203.10; TR 16). In *Bowman v. U.S. Department of Agriculture, et al.*, 363 F2d 81 (5th Cir. 1966), the Fifth Circuit, in approving the Secretary's test, stated:

“having in mind the remedial purposes of the Act, we hold that the test used for determining solvency or insolvency under the circumstances here was reasonable. A financial status where current assets exceed current liabilities would be the *sine qua non* of prompt payment.”

Bowman, 363 F2d at 85.

It is well-established that operating as a market agency or dealer subject to the Act while insolvent is an unfair and deceptive practice in violation of section 312(a) of the Act (7 USC § 213(a)). See e.g., *In re Southern Buyers, Inc.*, 14 Agric. Dec. 811 (1955); *In re John L. Cooper, et al. d/b/a Cooper Commission Company*, 19 Agric. Dec. 160 (1960). Respondent admits that it operated during the period in question, but denies that it was insolvent.

Ms. Bonnie Bergers, an auditor with the Portland, Oregon Regional Office of the Packers and Stockyards Administration, testified concerning the results of her analysis of respondent's financial condition. Her analysis as of October 31 1981, shows that respondent's current liabilities exceeded its current assets by approximately \$112,298.00. (FF. 11) For December 31 1981, Ms. Bergers' figures show an excess of current liabilities over current assets of approximately \$166,219.00. (FF. 12) An analysis done by respondent's own accountants also demonstrated that respondent was insolvent as of December 31 1981. (FF. 13)

Respondent argues that complainant improperly characterized respondent's secured line of credit, or operating loan, with the Idaho Bank and Trust Co. as short-term and, therefore, a current liability. Ms. Bergers testified that the note payable was considered a current liability because the note itself was a demand note. (TR 43, 44) The May 5 1981 note states, in pertinent part, "For value received, the undersigned, hereinafter referred to as Borrower, promises to pay to the order of IDAHO BANK AND TRUST CO. (Bank), *on demand*, or if no demand is made, then on April 1, 1982 . . ." (CX 8, p. 51 A; Emphasis added)

Mr. Mooney, a Vice-President and Manager of the Blackfoot, Idaho office of the Idaho Bank and Trust Company testified that because this note was a demand note, the bank had the right to, and would, demand immediate payment of the note if the bank felt that it was in its best interest to do so. (TR 569) In fact, the bank did not call the note due. But, this cannot, does not, convert a demand note into a note payable more than 12 months in the future.

Accordingly, the note was properly classified as a current liability on the analyses for both October 31 1981, and December 31 1981, done by Ms. Bergers. Interestingly, respondent's accountants also classified this note as a current liability. (cf., CX 9, p. 6, Notes payable-bank, unsecured-\$185,343)

Once insolvency has been established, it is presumed to be continuing. *In re Koenig*, 24 Agric. Dec. 1213, 1219 (1965). Respondent did not show that its financial condition between October 31 1981

and December 31 1981 was materially different from Ms. Bergers' figures. Respondent operated subject to the Act while insolvent.

Respondent did, however, introduce a statement purporting to demonstrate that as of December 31 1983, its current assets exceeded its current liabilities by approximately \$61,000. (RX 143) No documentation was proffered to support any of these figures. In fact, Mr. Lake testified that these were figures given him over the telephone by his accountant. (TR 717) This evidence is too abstract and conclusory to warrant much probative value. It does not overcome the presumption of continuing insolvency based on final detailed accounting analysis. Thus, the suspension will necessarily have to continue until such time as respondent clearly and persuasively demonstrates that it is currently solvent.

II

Respondent Failed To Maintain And Use Properly Its Custodial Account

A. As of March 30 1981, April 30, 1981, October 31, 1981, and December 31 1981, there were shortages in respondent's custodial account.

Ms. Bergers, as part of her audit of respondent's financial condition, analyzed its custodial account for March 30 1981, April 30, 1981, October 31 1981, and December 31 1981. Each analysis is supported by complete documentation and shows that on each date, respondent's custodial account had a shortage in the amount of funds available to pay consignors the net proceeds from the sale of their livestock on a commission basis.

Based on the bank statement for respondent's custodial account, the analysis as of March 30 1981, shows cash in the amount of \$145,384.32 in the account on that date. Also debited to the account in the analysis were deposits in transit in the amount of \$2,842.70 and proceeds receivable in the amount of \$28,023.30. This resulted in a total of \$176,250.32 in custodial funds available to pay shippers their proceeds.

As of March 30 1981, there were, however, outstanding custodial account checks in the amount of \$318,825.89 drawn on the account. This resulted in a shortage of funds available to pay consignors their proceeds in the amount of \$142,575.57. (CX 11; TR 83-85)

Respondent did not contest the accuracy of these figures or the data contained in Ms. Bergers' analysis (and supporting schedules) of the custodial account as of March 30 1981. Accordingly, it is not disputed that there was a shortage in custodial account funds available to pay consignors the proceeds from the sale of their livestock.

Respondent's custodial account was similarly analyzed as of April 30 1981, October 31 1981, and December 31 1981. Respondent introduced no evidence challenging the figures contained in complainant's analyses.

Ms. Bergers' analysis of the custodial account as of April 30 1981, demonstrates that there was a shortage in funds available to pay shippers their proceeds as of that date. The bank statement shows that there was a balance of \$276,056.40 in the account. There were no deposits in transit, proceeds receivable or any other debits. (CX 12; TR 87) There were outstanding checks drawn on the custodial account in the amount of \$296,715.58, resulting in a shortage in the custodial account of \$20,659.10 as of April 30 1981. (CX 12; TR 88)

The analyses for October 31 1981, reflects similar results. On October 31 1981, there were outstanding checks drawn on the custodial account in the amount of \$922,347.50. (CX 8, p. 26; TR 40) To offset these checks, respondent had total debits of \$901,594.65, consisting of a bank balance of \$193,366.60, deposits in transit of \$97,038.28, and current proceeds receivable of \$611,189.77. Comparing the total debits to the amount of outstanding checks shows a shortage of \$20,752.85. (CX 8, p. 26; TR 36-40)

On December 31 1981, there were outstanding checks drawn on the custodial account in the amount of \$102,044.95. (CX 10, p. 24, 27-28; TR 64) The bank statement showed a balance of \$83,457.07. (CX 10, p. 24, 26; TR 63) There were no other debits to offset the outstanding checks. (CX 10, p. 24; TR 63) Comparing the bank balance with the outstanding checks reveals a shortage of \$18,587.88 in funds available to pay shippers their proceeds on December 31 1981.

Respondent did not dispute the accuracy of complainant's figures, but was, apparently, content to point out that a few of the outstanding checks were issued to respondent or to businesses run by its owners (TR 131), and that no custodial account checks were ever returned for insufficient funds. (TR 134)

This is not a meritorious defense for, as the Judicial Officer specifically noted in *In re Bowman and Reynolds*, 23 Agric. Dec. 1605 at 1071, quoting *Harry C. Daniels, d/b/a Harry C. Daniels and Co. v. United States*, 242 F2d 39, 41-42 (7th Cir. 1957), cert. denied, 345 U.S. 939 (1957):

"The argument that there is no evidence of any particular shipper not being paid is not controlling. It is the duty of a regulatory agency to prevent potential injury by stopping unlawful practices in their incipiency. Proof of a particular injury is not required. *Federal Trade Commission v. Rala-*

dam Co., 316 U.S. 149, 152, 62 S. Ct. 966, 86 L. Ed. 1336, *Fashion Originators Guild of America v. Federal Trade Commission*, 312 U.S. 457, 466, 668, 61 S. Ct. 703, 85 L. Ed. 949."

While it is true that respondent did make a supplemental deposit into its custodial account to correct the deficiency, this was not done until May, 1982, and only after the shortage had been pointed out by Packers and Stockyards Administration officials. (TR 688)

B. *Respondent's failure to maintain and use properly its custodial account is a violation of the Act and regulations.*

Every market agency subject to the Packers and Stockyards Act is required to establish and properly maintain a Custodial Account for Shippers' Proceeds (9 CFR § 201.42(b)). Section 201.42(c) of the regulations (9 CFR § 201.42(c)) in effect at the time of the alleged violations gives detailed instructions on how to properly maintain a custodial account:

"(c) *Deposits in Custodial Accounts.* Before the close of the next banking business day after consigned livestock . . . is sold, the market agency . . . shall deposit in its custodial account the proceeds from the sale of consigned livestock . . . that are collected or received on the date of sale, and an amount equal to the proceeds receivable from the sale of consigned livestock . . . that are due from (1) the market agency . . . ; (2) any owner, officer, or employee of the market agency . . . ; or (3) any buyer to whom the market agency has extended credit. On or before the third day following the sale of consigned livestock . . . (or the next banking business day after the third day if such third day is a nonbanking business day), the market agency . . . shall deposit in the custodial account an amount equal to all the proceeds receivable from the sale of consigned livestock . . . , whether or not such proceeds have been collected or received by the market agency"

The evidence in the record of this proceeding clearly shows that respondent did not maintain its custodial account in accordance with the requirements of section 201.42 of the regulations.

Ms. Bergers' analyses show convincingly that the respondent permitted substantial shortages to develop in the amount of custodial account funds available to pay the outstanding custodial account checks issued to the consignors of livestock. (CX 8, 10-12)

Blackfoot Livestock, or its owners, made substantial purchases of consigned cattle on several occasions ranging well over \$100,000.00. (CX 14 and 15)

Under section 201.42(c) of the regulations (9 CFR § 201.42(c)), Blackfoot is required to reimburse the custodial account for its purchases or for the purchases of its owners or officers, Dennis Lake and Delwyn Ellis, by the close of business on the next business day following the sale (Monday). (TR 164)

Regularly and habitually, respondent failed to timely reimburse the custodial account for these purchases. (CX 14 and 15)

Respondent also violated the Act by depositing some of the sale proceeds in its general account—not the custodial account. For example, on each Monday during the period examined, amounts of trust funds from a low of \$32,469.12 on Monday, December 21 1981, to a high of \$284,899.84 on Monday, March 9 1981, were deposited not to the custodial account as required but into respondent's general account. (CX 14, 15; TR 155)

As trust funds, the proceeds from the sale of livestock sold on a commission basis may be used only to pay consignors the net proceeds from the sale of their livestock, after deducting the market's lawful charges. Properly maintaining such funds in a custodial account prevents them from being commingled with the firm's general operating funds and thereby endangered.

Mr. Griffin Bonham, Branch Chief, Marketing Practices Branch, Packers and Stockyards Administration, testified concerning his personal experience with situations where banks had offset funds in a market's general account to cover the market's indebtedness to the bank, but had been prevented from attaching custodial funds since those funds belonged to the consignors, not the market. (TR 537-38) *See also, Union Stock Yards Bank v. Gillespie*, 137 US 411 (1890); *Steere v. Stockyards National Bank*, 113 Tex 387, 256 S.W. 586 (1923)

Additionally, each consignor who has money in the custodial account is entitled to FDIC coverage up to \$100,000.00 rather than the account itself being subject to a single FDIC coverage of \$100,000.00. (TR 156)

Consignors are entitled to rely on the market's compliance with the regulations promulgated under the Packers and Stockyards Act (9 CFR §§ 201.40, 201.42) to ensure that their funds are being properly safeguarded in a custodial account. Rather than safeguarding these funds in a custodial account, however, Blackfoot diverted a significant portion of these funds each week to its general account where it was used for Blackfoot's own purposes.

During the period when Blackfoot had a substantial amount of trust funds in its general operating account rather than in its custodial account, Blackfoot was regularly making payments on its line of credit or operating loan from Idaho Bank & Trust Co. (CFR CX 16; TR 167-182)

While Blackfoot was depositing trust funds into its general operating account, even that was insufficient to prevent the general account from being overdrawn.

It was standard operating procedure for Blackfoot to divert custodial funds into its general account in order to enable it to more easily make payments on its operating loan.

In effect, Blackfoot was borrowing money from its consignors (without their permission) to help Blackfoot pay back the bank. In many cases, the custodial account was not reimbursed until the Wednesday or Thursday following a Friday sale. Blackfoot used its consignors' money for its own purposes and has endangered consignors' proceeds.

The Secretary has consistently held, and the courts have sustained, that the failure of a market agency to maintain its custodial account in accordance with the requirements of section 201.42 is a violation of sections 307 and 312(a) of the Act (7 USC §§ 206, 213(a)), as well as a violation of section 201.42 of the regulations. 19 CFR § 201.42) *In re Arab Stock Yard*, 37 Agric. Dec. 298, 301-02, 310-11 (1978); *In re Breckenridge Auction & Sales Co.*, 36 Agric. Dec. 1522 (1977); *In re Sechrist Sales Co.*, 36 Agric. Dec. 665, 666, 671-72 (1977); *In re Hardy*, 33 Agric. Dec. 1383, 1398-1406 (1974); *In re Miller*, 33 Agric. Dec. 53, 60-62 (1974), *aff'd sub. nom.*, *Miller v. Butz*, 498 F2d 1088 (5th Cir. 1974); *In re Lufkin Livestock Exchange, Inc.*, 27 Agric. Dec. 596, 605-10 (1968); *In re Anderson*, 26 Agric. Dec. 615, 619-20 (1967); *In re Koenig*, 24 Agric. Dec. 1213, 1219-20 (1965); *In re Bowman*, 23 Agric. Dec. 1074, 1086-89 (1964), *aff'd*, *Bowman v. United States Department of Agriculture*, 36 F2d 81 (5th Cir. 1966); *In re Bowman and Reynolds*, 23 Agric. Dec. 1065, 1068-71 (1964); *In re Daniels*, 14 Agric. Dec. 903, 913-17 (1955), *aff'd*, *Daniels v. United States*, 242 F2d 39 (7th Cir. 1957), *cert denied*, 345 U.S. 939 (1957).

Further, the Secretary has repeatedly determined that a market agency's failure to make deposits to its custodial account in the manner and within the times prescribed in section 201.42 is an unfair and deceptive practice. "It is deceptive because shippers do not know that their money is being used to extend credit to buyers. It is unfair because it is using trust money for their own purposes (to extend credit to themselves and others.)" *In re Hardy*, 33 Agric. Dec. at 1400.

It should be noted that Blackfoot had previously been placed on notice as to the requirements governing reimbursement of the custodial account in a letter dated November 17 1975. (CX 5) Blackfoot was aware of the requirements and the regulations are clear, yet, as Mr. Lake testified, it was standard practice to deposit funds into the general account and to reimburse the custodial account for those deposits and Blackfoot's own purchases at a later date. (cf., TR 771)

Therefore, Blackfoot has failed to maintain and use properly its custodial account and has used custodial funds for its own purposes in violation of sections 307 and 312(a) of the Act (7 USC §§ 208, 213(a)), and the regulations (9 CFR §§ 201.40, 201.42).

III

Respondent Blackfoot Wilfully Violated The Act By Engaging In An Exchange Of Checks (Check Kiting) With Uinta Livestock For The Purpose Of, Or With The Effect Of, Creating A False "Float" Or Balance In Both Companies' Bank Accounts

During the period from January 7 1981 through May 20 1981, respondent Blackfoot issued in excess of 75 drafts made payable to Uinta Livestock Commission Company. These drafts totalled \$8,629,649.58. (FF 23; CX 17A) Uinta Livestock issued checks made payable to Blackfoot during the same period in the amount of \$8,697,664.44. (FF 21; CX 17A) It is clear that whenever a Blackfoot draft was given to Uinta, a Uinta check for the same amount was issued, almost always on the same day, to Blackfoot.

Both Ms. Kimball⁴ and Mr. Andreasen, office manager and owner, respectively, of Uinta, testified that Uinta had been given a Blackfoot draft book and was authorized, by Paul Thompson, who was at that time an owner and officer of Blackfoot, to issue Blackfoot drafts to Uinta. (TR 334) Both individuals further testified that many of the Blackfoot drafts were used to cover Uinta's almost daily overdraft position in its bank account. (FF 24; TR 309-10) Ms. Kimball testified that she immediately informed Kay Monson, a Blackfoot employee, whenever she issued a Blackfoot draft. (TR 338)

⁴ Ms. Kimball's testimony is entitled to great weight and probative value. Her participation was described by her in a most direct, unhesitating, frank manner. She was completely open, sincere, and cooperative.

She had carried out her instructions as an employee of Uinta, and she took pains to describe accurately what was done.

Courage was required to so testify. She had been given no promise of any immunity of any kind. (TR 306)

In late April or early May 1981, many of the drafts began to show notations as to the names of sellers, number of head and weight of the livestock purportedly purchased and paid for by the particular draft. Ms. Kimball admitted that these entries were fictitious and that there were no livestock involved. (FF 25; TR 312) These entries were made at the request of Paul Thompson to allay Dennis Lake's concerns about the large amount of money involved. (TR 312, 332)

Respondent would like everyone to believe that it was simply financing Uinta's livestock purchases. Such a conclusion, however, ignores the clear dictates of all the evidence and defies all logic, since, at the time Blackfoot issued drafts to Uinta, there were not sufficient funds in Blackfoot's account to cover the drafts. (CX 18B; TR 285-293) Only the check given by Uinta in exchange permitted the Blackfoot draft to be honored. It is simply not possible for a person without funds to finance another.

Furthermore, both Kimball and Andreasen testified that they used many of these drafts solely to correct the overdraft position of Uinta's bank account and that Paul Thompson, at least, knew it. (TR 309, 346, 350) The sheer volume of the purchases, in excess of \$8.6 million in a five-month period, suggests that these drafts were not for livestock purchases. It is virtually impossible that Uinta bought such a large amount of livestock on an almost daily basis. It is ludicrous to assert that Blackfoot was legitimately financing Uinta when Uinta was writing a check in exchange for Blackfoot's draft within minutes. (FF 26, TR 313) If Uinta could immediately repay Blackfoot, then there was no reason to borrow the money in the first place.

It is clear, therefore, that this arrangement between Blackfoot and Uinta was not a financing arrangement as Blackfoot would have us believe, but a deliberate attempt on the part of both Uinta and Blackfoot, with the full knowledge and complicity of each, to manipulate uncollected funds in their bank accounts.

An analysis shows Uinta's "net bank balance" (between 1/2/81 and 6/2/81) was in an overdraft position on each and every day except two. (CX 18A) Obviously, since some Blackfoot drafts were used to cover overdrafts in Uinta's account, Mr. Andreasen knew he did not have sufficient funds in his account to pay the Uinta checks issued in exchange for, or to repay, the Blackfoot drafts. Clearly, he was relying on being credited with the deposit of another Blackfoot draft into the Uinta account prior to that check being returned.

An analysis of Blackfoot's daily bank balances, based on the bank statements, with the Uinta checks which have been credited

to Blackfoot's account although not yet presented for payment at Uinta's bank, and the amount of Blackfoot drafts issued to Uinta, but not yet presented to Blackfoot's bank for payment (TR 285, 286) shows a daily "net bank balance" for Blackfoot's account during the period January 2 1981 through May 29 1981 which, with few exceptions, was in an overdraft position. (CX 18B)

Tracing the following example of the exchange shows how the scheme operated. The first Blackfoot draft listed on CX 17A is draft #4449, dated January 7 1981, in the amount of \$217,472.32. (CX 17B, p.1) Uinta deposited this draft in its account at Zions First National Bank on January 7 1981. (CX 17C, p. 1) On January 8 1981, Uinta issued its check #2583 to Blackfoot in the same amount, \$217,472.32. (CX 17B, p. 2) Blackfoot deposited Uinta's check in its account at Idaho Bank and Trust Co. on January 12 1981. (CX 17D, p. 1) On January 7 1981, when Blackfoot's draft was issued in the amount of \$217,472.32, Blackfoot had \$45.27 in its bank account. (CX 18B, p. 1; CX 17G, p. 1) Clearly, when Blackfoot's draft was issued on January 7 1981, it did not have sufficient funds to cover the draft.

On January 8 1981, when Uinta issued its check for \$217,472.32 in repayment of the Blackfoot draft, it had an account balance according to the bank statement of only \$2,679.78. (CX 17E, p. 1) Its net bank balance after subtracting Blackfoot drafts credited to its account but not yet honored was an overdraft of \$424,140.29. (CX 18A, p. 1) Uinta, too, had insufficient funds to cover its check.

Despite the fact that neither party had sufficient funds in their accounts, the drafts and checks were honored when presented because their account balances on the day of presentment appeared to be sufficient. By the time a draft or check arrived for payment, another check or draft had already been deposited. This creation of an artificial balance is the purpose of a check exchange. (TR 294)

During these five months, over 8.6 million dollars in checks and drafts, none of which had sufficient funds available in support of the instrument when issued, were issued and negotiated. This is commonly known as a check exchange, check kiting, or a manipulation of uncollected funds. (TR 294)

Mr. Angus Belliston, Senior Vice-President of Zions First National Bank, explained a manipulation of uncollected funds arrangements as follows:

"Q: . . . [c]ould you explain what a manipulation of uncollected funds arrangements is?

A Yes, I think so. When a person or company deposits someone else's checks into their own account at our bank, or any bank, what we really have is just paper.

We have a deposit of checks which represent money, but it isn't really money; it's just paper until we send those checks to the bank they're drawn on and receive the actual collected funds in the account.

And between the time the funds are deposited in the account at our bank and the time we actually get the funds from the bank they were drawn on, that's a time that we refer to as "float."

It's not real money, it's just uncollected funds. It's funds that are there on their account, and we have entered them on our ledger, but they really aren't charged yet, so we call them uncollected funds.

Sometimes, people try to manipulate those uncollected funds between banks to make it appear that there's real money there, and they spend the uncollected money, and we occasionally get caught. It's one of the risky parts of banking."

(TR 371-72)

In fact, the bank did get caught when Dennis Lake refused to honor certain drafts. The damage to Uinta's bank was approximately \$800,000.00 (TR 369).

Paul Thompson, Respondent's Vice-President during the period of the check-kiting activities (until his death about May 19 in an automobile accident) was the key and main link between Blackfoot Livestock and Uinta during the check-kiting activities. However, other Blackfoot Livestock employees were aware of the relationship with Uinta, e.g., Kay Monson was called by Carol Kimball every time Carol wrote a Blackfoot draft in favor of Uinta and gave Kay Monson the numbers and date. In addition, Dennis Lake was aware of the relationship and was becoming concerned about it. (TR 338)

Furthermore, it should be noted that Ms. Kimball testified that the reason she put fictitious names and entries on the entries on the Blackfoot drafts was because Dennis Lake was concerned as to how Blackfoot's bank would view all these drafts issued to Uinta. (TR 323) Additionally, it was clear from Mr. Lake's testimony at the hearing that he is extremely knowledgeable as to the oper-

ations of Blackfoot. Mr. Lake has an accounting background up to and including some graduate level work in accounting. (TR 616, 617) Mr. Ellis has no formal education beyond high school. (Tr. 737) Mr. Lake noted that Paul Thompson was not a well-educated man; he was not even a high school graduate. (TR 738).

It is naive to believe, therefore, that Blackfoot's other part owners decided that Paul Thompson, a part owner without an accounting background, would have sole responsibility for monitoring and maintaining the records of a "financing" arrangement involving over 8.6 million dollars while Dennis Lake, the part owner with the accounting and financial background, knew nothing of this arrangement. Mr. Lake, in fact, admitted he supervised the maintenance of the books and records. (TR 738)

But, in any event, the respondent corporation is ultimately responsible for the acts of its officers in carrying out their functions on behalf of the respondent corporation. The extent of knowledge that any particular officer had at any particular point of time may be debatable, but not relevant for purposes here. Respondent corporation is responsible for the actions of its officers and employees in carrying out their duties. The evidence here clearly shows that more than one officer knew or should have known what was taking place. Respondent corporation bears the full and ultimate responsibility.

The evidence adduced at the hearing clearly demonstrates that Blackfoot was engaged in check-kiting with Uinta. As a result of its actions, Blackfoot created an artificial balance in its bank account which increased the financial exposure to sellers or consignors of livestock to Blackfoot. Blackfoot was relying on the "float." (TR 294, 371)

Accordingly, Blackfoot has engaged in an unfair and deceptive practice in violation of section 312(a) of the Act which warrants a severe sanction. *cf.*, *In re Lynn Rose and Twin Falls Livestock Commission Co.*, 41 Agric. Dec. 1557 (1982) (Rose), 41 Agric. Dec. 1386 (1982) (Twin Falls); *In re Menchhofer Cattle Co., Lyle Menchhofer, Edward Wendel and Ronald Egbert*, 40 Agric. Dec. 1324 (1981) (Menchhofer Cattle Co. and Menchhofer), 41 Agric. Dec. 464 (1982) (Egbert).

Blackfoot Has Wilfully Violated The Act And Regulations By Permitting Dennis Lake And Delwyn Ellis, Its Owners And Officers, To Purchase Livestock Out Of Consignment For Resale For Their Own Speculative Accounts.

A market agency selling livestock on a commission basis has a fiduciary duty to each of its consignors to market his livestock in a manner best designed to enable the consignor to obtain the highest possible price for his livestock. Section 201.58 of the regulations promulgated under the Act requires the market to sell livestock in such a manner as to promote the interest of the consignors. (CFR § 201.58)

It is the responsibility of a market agency such as Blackfoot to obtain the true market value of the livestock for its consignors. The market should purchase livestock itself only to assure that the consignor gets the true market value of those livestock. (TR 462) Section 201.57(a) of the regulations in effect at the time of the transactions in question specifically provided that "[n]o market agency engaged in selling consigned livestock at auction shall permit its owners, officers, agents, or employees to purchase livestock from consignments for resale for their own speculative accounts" (9 CFR § 201.57(a)).

The regulation is designed to insure that the market agency fulfills its fiduciary duty to further the interests of its consignors. A market which purchases livestock out of consignment for speculative purposes, or permits its owners to do so, has a conflict of interest. If it begins speculating, it erodes its loyalty to the consignor; it is no longer seeking the highest possible dollar for the consignor, but rather acting in its own interest in order to maximize its potential profit on resale. (TR 539)

Whether a particular purchase is a purchase to support the market, and therefore consistent with fulfilling the market's fiduciary responsibility to its consignors, or a purchase for speculative resale depends upon an analysis of all the circumstances surrounding the case. No one single factor is dispositive.

Market support purchases are purchases made by the market when it feels that the highest bid does not reflect the true market value of the livestock. (TR 478)

Speculation out of consignment, on the other hand, is defined as purchasing livestock from consignment with the expectation or the intention of making a profit on the prompt resale of these animals, whether or not a profit is realized. (TR 461)

A market which purchases livestock out of consignment for speculative resale or permits its owners and officers to do so has breached its duty to its consignors in violation of the Act. *See, e.g., In re Smithfield Livestock Market, Inc.*, 36 Agric. Dec. 1546, 1562-67 (1977).

The evidence in this case clearly demonstrates that Dennis Lake and Delwyn Ellis, the owners and officers of Blackfoot, consistently purchased large numbers of livestock consigned to Blackfoot, for sale on a commission basis, with the intent or expectation of promptly reselling them at a profit. Mr. Lake and Mr. Ellis regularly purchased a large volume of the consigned livestock. Such regular and voluminous purchases are not consistent with market support purchases and is a factor indicating that these purchases were made with the intent or expectation of making a profit. (TR 461)

Not only did Lake and Ellis purchase a large volume of livestock each week, but their purchases were treated in Blackfoot's records like any other transaction in which livestock was purchased for speculative resale, and not as market support purchases. Separate deal sheets were maintained for both Lake and Ellis. The livestock was invoiced to Lake and Ellis—not Blackfoot. There was no journal or other record kept showing these to be market support purchases. (TR 498, 499)

Significantly, even those cattle that Lake and Ellis could not resell and which were, therefore, sold through auction the following week were noted on the individual deal sheets as sales by Lake and Ellis. *cf* CX 20E, p. 5, 18 (11 head from Lake), and CX 20E, pp. 20, 29 (2 head from Ellis).

The purchases made by Mr. Lake and Mr. Ellis were their own individual purchases, kept totally separate as to purchase and resale. The profit, if any, generated by the transaction was noted on each deal sheet. *See, e.g.*, the profit figure of \$1,869.95 on CX 20E, p. 20.

In addition to having the purchases of Lake and Ellis kept as separate and individual transactions and not those of the market, Lake and Ellis handled these as dealer transactions. Mr. Blaine Ramey, a former owner of Blackfoot, testified that he still attends the Blackfoot sales most of the time and is familiar with the roles fulfilled by Mr. Lake and Mr. Ellis. (TR 662) He noted that Lake and Ellis compete with other bidders for cattle that they want to buy. (TR 663) They will bid on these cattle more than once in order to obtain them. (TR 663)

Actively bidding on cattle in competition with other bidders is the act of a person who is trying to get cattle for resale, presum-

ably at a profit. If there are other bidders, Blackfoot should not want these cattle. Blackfoot should not bid on these cattle once the cattle are started unless and until the last bid is in and Blackfoot believes it is lower than true market value.

This, however, is not what Mr. Lake and Mr. Ellis did; when there were livestock in the ring which either sought, they actively bid on the cattle. (TR 663) They wanted these cattle for their own individual accounts, for profit on resale.

Mr. Lake, for example, had extensive dealings with a Joe Shrader, a dealer from Colorado. Mr. Shrader testified that he discussed Blackfoot consignments with Dennis Lake every Friday prior to the sale. (TR 518) During the course of these conversations, Mr. Shrader and Mr. Lake discussed the demand for heifers in Colorado and the prices dealers were willing to pay for them. (TR 519, 520) Generally, according to Mr. Shrader, Mr. Lake would call Shrader after the sale and ask him whether he would be willing to buy cattle that Lake had purchased that day at the sale. (TR 521)

In fact, Mr. Lake sold over 1700 head of cattle to Mr. Shrader, often at substantial profit. (CX 20A-P) For example, on February 5 1982, Lake sold 99 heifers to Mr. Shrader for \$25,775.78 when he purchased these heifers earlier in the day out of consignment at a cost of \$25,548.43. Mr. Lake made a profit of almost \$2.30 per head in this transaction. (CX 20M, pp.5-9)

Dennis Lake was not trying to dispose of cattle he was forced to purchase because the last available bid did not reflect true market value. It appears more than likely that he was trying to purchase these cattle at the lowest possible price and resell them at the highest possible price—dealer behavior.

Unlike any other dealer, however, Lake had the advantage of knowing what livestock was being consigned to his market prior to sale day. While Mr. Ramey testified that the typical auction market knows approximately 85 percent of the cattle being consigned prior to sale day (TR 659), Lake testified that over 50 percent came on sale day. (TR 788) Regardless of which figure is used, it is clear that the market owners have an unfair advantage over outsiders who do not have similar information. See, e.g., *In re Smithfield Livestock Market*, 36 Agric. Dec at 1563.

Mr. Lake knew generally what Mr. Shrader was looking for and the price Shrader was willing to pay, before each auction began. He took advantage of this knowledge to buy significant numbers of livestock himself and resell to Mr. Shrader at a profit. This is more characteristic of a dealer buying and selling livestock for his own account. It is not market support.

Mr. Ellis, too, had his customers. James Paulsen testified that at the time of the transactions in the complaint, he was a co-owner and vice president of Bachman Cattle Company and, in that capacity, often bought feeder cattle from Mr. Ellis. (TR 391) During the heavy trading season, they would be in contact with each other several times a day. (TR 391)

Mr. Paulsen often "partnered" on an ad hoc basis with Mr. Ellis on cattle. Some of these "partnered" deals were on cattle consigned to Blackfoot market for sale. (TR 393)

Mr. Paulsen, at one point, indicated that they were operating at Ellis' "cost," consistent with their "partnering" relationship. Later, however, he hedged and eroded the point.

But, in any event, the records indicate that Mr. Ellis made \$7.58 to \$12.50 paper profit per head and \$5.00 per head commission, totalling \$805.00 on a transaction with Paulsen.

This transaction occurred about an hour after the auction ended. Surprisingly, Paulsen said he had been in attendance at that auction, but had not bid on those cattle. (TR 397) (Earlier, he had given an affidavit that he had not been at that sale, and that Mr. Ellis had phoned him describing the cattle and pricing them at Ellis' cost plus commission) (TR 398; RE 109, p. 4)

But, regardless of which version is correct, one fact is self-evident. The consignors who paid Blackfoot a commission to sell their livestock for the best possible price, very likely did not receive true market value if Ellis resold them at such an increased price within an hour. Blackfoot's fiduciary duty to its consignors suffered.

Another factor which indicates that Lake and Ellis were speculating out of consignments rather than supporting the market is that on most of these transactions they made a profit. Profit is not the sole criterion here, but it is a key element in the picture. (TR 494)

Excessive or consistent profit on the subsequent sale of livestock which the market or its owners purchase out of consignment is a strong indication that the market was not fulfilling its fiduciary duty to sell the livestock at the highest possible price for its consignors. The profits should belong to the consignors and the market receives a commission as its sole compensation for its selling services.

The circumstances surrounding the purchase of livestock out of consignment by Mr. Lake and Mr. Ellis demonstrates that these purchases were not market support purchases as Blackfoot contends, but rather were speculative purchases made with the intent or expectation of making a profit, whether or not a profit was realized.

If it were true market support, there would be no reason to maintain separate deal sheets for Mr. Lake and Mr. Ellis; there would only be a record for Blackfoot purchases. In true market support, one would not find the consistently large volume of purchases.

While market support purchases may result in a profit (if the market changes), one would not expect to find consistent and substantial profits on market support purchases, and certainly no profits of between \$7.50 and \$12.50 per head within an hour.

The evidence establishes that Blackfoot permitted its owners and officers to purchase livestock out of consignment for speculative resale in violation of sections 307 and 312(a) of the Act (7 U.S.C. §§ 208, 213(a)), and section 201.57(a) of the regulations (9 CFR § 201.57(a)).

Blackfoot Wilfully Issued Drafts In Payment For Livestock In Violation Of The Act

There was no dispute at the oral hearing that Blackfoot issued drafts rather than checks in payment for its livestock purchases. (CX 21; TR 463) Mr. Lake's testimony was that while they used drafts in the past, they had discontinued using drafts at the time of the hearing. (TR 733)

Mr. Mooney, Blackfoot's banker, described the difference between a draft and a check as follows:

"A draft is written for payment of something but it has to be accepted by the people who are drafting . . . When that draft is cleared, assuming the cattle are delivered, they have the option of paying it or not paying it. A check is drawn and has to be paid on presentment, unless you stop it."

(TR 478)

Mr. Mooney further explained that since the draft has no account number and the issuer has to be contacted to ascertain whether he accepts the draft, the bank must handle each draft manually. (TR 579) Mr. Mooney admitted that the extra time necessary to process the draft can take an additional day before the draft is honored. (TR 580)

Section 409(a) of the Act (7 U.S.C. § 288b(a)) requires each packer, market agency or dealer purchasing livestock to pay for his purchases before the close of the next business day following purchase and transfer of possession of the livestock. Payment may be made by check or wire transfer.

The legislative history pertaining to passage of section 409 of the Act in 1976 clearly demonstrates that payment by use of a draft does not satisfy the prompt payment requirements of section 409(n). H.R. Rep. No. 94-1043, 94th Cong., 2nd Sess. 7 (1976) Under section 409(b), the parties may agree to payment in a manner other than that required in subsection (a). Such an agreement, however, must be in writing.

Blackfoot admitted it did not have any written agreements to pay for livestock purchases with drafts. (TR 463-64) Blackfoot, by using drafts, effectively granted itself extra time in which to pay for livestock without the seller's permission.

Issuing drafts in payment for livestock purchases without first obtaining a written extension of credit is an unfair and deceptive practice in violation of sections 312(a) and 409(a) of the Act (7 U.S.C. §§ 213(a), 288b), and section 201.43(b) of the regulations (9 CFR § 201.43(b)).

VI

Jencks Act

At the conclusion of the direct testimony of most of complainant's witnesses, respondent's counsel requested, pursuant to the Jencks Act, 18 U.S.C. § 3500, all statements of the witness, including the investigation reports or any document in the possession of the United States, and relating in any way to the issues. (TR 91)

Counsel repeatedly sought complainant's investigative report. "I assume that there was some kind of investigative report prepared and we'd like a copy of it." (TR 92) " . . . it is respondent's position, and we respectively [sic] move at this time, that the investigative report—investigation report is a subject of Jencks and a proper subject of a motion and we move the Court for an order demanding of the United States that it be turned over to us." (TR 185)

During the hearing, several memoranda prepared by various witnesses were given to respondent. However, complainant never conceded that the investigation report was a "statement" of a witness as defined under the Jencks Act, and refused to voluntarily give the report to respondent. (*See, e.g.*, TR 98, 185)

The disposition of this issue is governed by section 1.141(g)(1)(iii) of the Department's rules of practice (7 CFR § 1.141 (g)(1)(iii)) which provides that:

"After a witness called by the complainant has testified on direct examination, any other party may request and obtain the production of any statement, or part thereof, of such witness in the possession of the complainant which

relates to the subject matter as to which the witness has testified. Such production shall be made according to the procedures and subject to the definitions and limitations prescribed by the Jencks Act (18 U.S.C. § 3500)"

7 CFR § 1.141(g)(1)(iii)

Pre-trial discovery is not generally permitted in administrative hearings. See, *Ubiotica Corporation v. Food and Drug Administration*, 427 F2d 376, 381 (6th Cir. 1970). Neither the Packers & Stockyards Act nor the Department's rules of practice provide for discovery.⁵ *Fairbank v. Hardin*, 429 F2d 264, 268 (9th Cir.), *cert. denied*, 400 U.S. 943 (1970); *In re Machado and Cozzi*, 42 Agric. L. 820 (October 20 1983) (decision as to respondent Cozzi) *aff'd* 749 F.2d 36 (CA 9 1984); *McClelland v. Andrus*, 606 F2d 1278, 1285 (D.C. Cir. 1979); *Moore v. Administrator, Veterans Administration*, 475 F.2d 1283, 1286 (D.C. Cir. 1973).

Respondent is entitled only to statements producible under the Jencks Act. The Jencks Act provides, in pertinent part:

"After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use. 18 U.S.C. § 3500(b)"

The Jencks Act sets forth the requisite factors to lay a foundation for the production of material in the possession of the United States. A proper foundation requires:

- (1) that the defendant make a motion,
- (2) *after* a government witness has testified on *direct examination*,
- (3) for the production of a *statement*,
- (4) *as defined* in the Act,
- (5) *which relates* to the testimony on *direct examination*.

⁵ Very limited exchange of information and proposed exhibits as authorized by section 1.140(a) of the Rules of Practice (7 CFR 1.140(a)) may arguably be labeled "discovery," but the point is not relevant nor material here.

A. Respondent is not entitled to complainant's entire investigative report

Respondent's concept of what constitutes a statement as defined in the Jencks Act is much too broad. As noted by the Judicial Officer in *In re Machado and Cozzi*, although the Jencks Act reaffirms the *Jencks* decision (353 U.S. 657, 665-69 (1957)) that a defendant is entitled to certain material in the possession of the government relating to the witness' testimony:

"[t]he principal purpose of the Jencks Act is to prevent defendants from roving at will through Government files as a result of misinterpretation of the *Jencks* decision. *Goldberg v. United States*, 475 U.S. 94, 104 (1976); *Palermo v. United States*, 360 U.S. 343, 350, 354 (1959); *United States v. Pope*, 574 F.2d 320, 324 (6th Cir.), *cert. denied*, 439 U.S. 868, 436 U.S. 949, 436 U.S. 929 (1978); *United States v. Nickell*, 552, F.2d 684, 688-89 (6th Cir. 1977), *cert. denied*, 436 U.S. 904 (1978); *United States v. Smaldone*, 544 F.2d 456, 460 (10th Cir. 1976), *cert. denied*, 430 U.S. 967 (1977); *United States v. Catalano*, 491 F.2d 268, 274 (2nd Cir.), *cert. denied*, 419 U.S. 825 (1974); and *see, Foster v. United States*, 308 F.2d 751, 755-56 (8th Cir. 1962)."

In re Machado and Cozzi, supra, at page 840.

It is important to note exactly what respondent requested. Respondent specifically sought complainant's entire investigative report. For example, after Ms. Bergers, an auditor with the Packers and Stockyards Administration, testified as to the results of her investigation of respondent's financial condition, respondent made its purported Jencks Act request. "I assume that there was some kind of investigative report prepared and we'd like a copy of it." (TR 92) Respondent did not seek specific statements of Ms. Bergers, but rather "all statements, . . . including the investigation report . . . or any other [relevant] document which is in the possession of the United States" (TR 91, emphasis added).

After Mr. Kienow testified, respondent renewed his claim for the entire investigative report. "To the extent that this man was the [assistant] regional supervisor, at that time, of that particular office, I believe the entire report would be in his possession . . . and I would make a motion to the Court of such a thing [the investigative report]." (TR 183)

Respondent's counsel in pressing his argument for the entire file explained why he wanted it:

" . . . I know Mr. Jones; I know that he's the ultimate officer that's charged by statute to sign these administrative disciplinary complaints. I understand that, but what--up to that time, there were many subtle and some not-so-subtle kinds of decision made within the agency, within the office of general counsel, within the financial protection branch which the P&SA, totally to the decision that it was going to bring this action . . . " (TR 187)

The following colloquy is significant:

"The COURT: You're looking for the motivation for the complaint to be filed?

Mr. Cook: Yes, sir."

(TR 188) Respondent was seeking the agency's internal review; the case, the legal reasoning of complainant's attorneys, and the analysis of the evidence, not only of Ms. Bergers or of Mr. Kienow but of the entire agency and the Office of the General Counsel in order to prevent a chilling effect on the agency's deliberative privilege, such material has been held to be not a "statement" producible under the Jencks Act. *United States v. Dark*, 597 F.2d 1067 (10th Cir. 1979), cert. denied, 444 U.S. 927 (1979); *Ubiotica Corp. v. Food and Drug Administration*, 427 F.2d at 381-82; *In re Machado and Cozzi*, *supra*, at page 840.

The Jencks Act does not authorize fishing expeditions by the defendant or an unrestrained search through government files. *In re Machado and Cozzi*, *supra*, at page 840, citing *United States v. Graves*, 428 F.2d 196, 199 (5th Cir.), cert. denied, 400 U.S. 960 (1970); *United States v. O'Brien*, 444 F.2d 1082, 1085 (7th Cir. 1971); *United States v. Catalano*, 491 F.2d at 274. An unlimited request for production of the entire investigative file was too broad in scope and character to be seriously considered under the Jencks Act.

B. Affidavits and memoranda of interviews with individuals recalled as government witnesses are not producible under the Jencks Act.

Mr. Kienow testified respondent permitted its owners or officers to purchase livestock consigned to the market for sale on a commission basis. Respondent then requested any statements of specifically named persons who were interviewed by Mr. Kienow. (TR 46 RX 144) The request was later expanded beyond the affidavits of these individuals to include any memoranda or notes made by Mr. Kienow concerning the interviews of these witnesses. (TR 474)

None of these individuals listed on RX 144 were called as witnesses by complainant. Accordingly, by its terms the Jencks Act or the Department's rules of practice are not applicable since they provide that the respondent is entitled only to statements of a witness called by complainant. (7 CFR § 1.141(g)(1)(iii))

Respondent's argument that Mr. Kienow's taking affidavits from interviewees make that affidavit Kienow's statement, and thus a "statement" under Jencks (TR 469), is simply wrong.

An affidavit of another person, or a memorandum in which the interviewer writes down what the interviewee told him, is clearly not the "statement" of the interviewer. It is the statement of the person interviewed and producible under Jencks or the Department's rules of practice only if that person was called as a witness by complainant. Accordingly, the respondent's request for these affidavits and the memoranda pertaining to the interviews was properly denied as material facially not within the scope of the "Jencks" limitations here.

C. Job applications listing investigations not Jencks Act material

Respondent also requested that the SF 171 submitted by Mr. Kienow in applying for his present position as Regional Supervisor of the Omaha, Nebraska regional office of the Packers and Stockyards Administration be given it. (TR 222) The purported basis for respondent's motion was that Mr. Kienow testified that he listed his investigation of Blackfoot on his application as one of the investigations he had conducted while assigned to the Portland regional office. (TR 222)

The Department's rules of practice in adopting the Jencks Act definitions and limitations require that any statement of the witness to be producible must relate to the witness' direct testimony. (18 U.S.C. § 3500(b); *In re Machado and Cozzi, supra*, and cases cited therein)

Mr. Kienow's direct testimony concerned the schedules he prepared from his examination of respondent's records, the evidence supporting his schedules and the conclusions he drew as to whether the schedules and supporting documentation demonstrated violations of the Act and the regulations.

Essentially, respondent engaged in the broadest possible fishing expedition in the hope of helpful material or legal error. Respondent patently sought anything and everything for these two purposes. Respondent's focus, emphasis, persistence and intensity, was consistent, and did not distinguish between material arguably within the Jencks Act and far-out demands. The record fails to show that any Jencks Act material was withheld from respondent.

In fact, to the contrary, it shows that more than Jencks material was given to respondent in a futile attempt to satiate its demand and timely move the process forward.

The record fails to show any arguable Jencks Act material which was not provided to respondent and nothing to warrant an in camera inspection of complainant's files and records.

A trial judge without a jury must exercise caution when required to rummage through the non-evidentiary material in possession of complainant. The potential for prejudicial material is both bilateral and real.⁶

The record fails to lay a foundation to establish that demand material came within the scope of the Jencks Act limitations so as to warrant an in camera inspection.

VII

Respondent's Violations of the Act and Regulations Are Willfully Flagrant and Seriously Jeopardize the Interests of the Consignors of Livestock to Respondent's Market and the Industry

Respondent had previously been placed on notice concerning the prohibition against engaging in each of the violations alleged in the complaint, with the exception of the exchange of checks or check kiting scheme. (CX 1-6)

The violations proven here were not accidental or inadvertent but were, rather, committed with full knowledge that they were prohibited by the Act and regulations.

Respondent cannot avoid responsibility for exchanging some drafts and checks with Uinta totalling \$8.6 million.

As noted by the Judicial Officer in *In re Lufkin Livestock Exchange, Inc.*, 27 Agric. Dec. 596, 609 (1968):

"The term 'willful' is one of many meanings. It is often used to denote an act which is intentional or knowing, or voluntary, as distinguished from accidental. *In Great Western Food Distributors v. Brannan*, 201 F.2d 476 (7th Cir. 1953), acts done intentionally were held to have been done willfully. Conduct is willful if a person intentionally does an act which is prohibited, irrespective of evil motive or reliance on erroneous advice, or if he acts with careless

⁶ Here, the investigators were out to investigate possible violations. Raw material suggesting possible violations (but which did not mature into complaint allegations) is probable. See, for example, RE #105, re possible tariff violations. Such material may be highly prejudicial to respondents. On the other side, the file may contain material prejudicial to complainant, e.g., disagreements as to how the law should be interpreted/applied, potential factual or credibility weaknesses highlighted, etc.

disregard of statutory requirements. *Goodman v. Benson*, 286 F.2d 896 (9th Cir. 1961)."

Here respondent acted intentionally in careless disregard of the statutory requirements. Respondent, therefore, wilfully violated sections 307, 312(a) and 409(a) of the Act (7 USC §§ 208, 213(a), 228b), and sections 201.42, 201.43(b), and 201.57(a) of the regulations (9 CFR §§ 201.42, 201.43(b), 201.57(a)). See, e.g., *Smithfield Livestock Market, Inc.*, 36 Agric. Dec. 1546 (1977); *In re Hardy*, 33 Agric. Dec. 1383 (1974); *In re Lufkin Livestock Exchange, Inc.*, 27 Agric. Dec. 596 (1968).

The requirement that a market's current assets exceed its current liabilities is not frivolous. The prompt pay provision of the Act (7 USC § 228b) and the custodial account regulations requiring the market to pay the consignors the net proceeds from the sale of consigned livestock before the close of business on the day following sale (9 CFR § 201.43) mandate that the firm's current assets exceed its current liabilities. As noted by the Fifth Circuit, in *Bowman*, 363 F.2d at 85, current assets exceeding current liabilities is the *sine qua non* of prompt payment.

Blackfoot's solvency problems were compounded by the fact that on four separate dates analyzed by Packers and Stockyards Administration officials, there was a shortage in its custodial account. On those dates, the outstanding checks drawn on its custodial account exceeded its money in the bank, deposits in transit and current proceeds receivable. If all the outstanding checks had been presented for payment on the dates analyzed, there would have been insufficient funds available to pay the checks. The fact that no checks were returned is no defense. See, pp. 20-23, *supra*.

The bank could call the loan due at any point the bank felt it was in the best interest of the bank to do so. Problems of a serious magnitude would ensue.

The importance of registrants properly maintaining their ratio of current assets to current liabilities cannot be over-estimated where the agency is unable to routinely audit every market agency in the country. There are 1800 auction markets and approximately 6000 dealers throughout the country registered with the Secretary of Agriculture. (TR 533) It is, therefore, impossible to closely monitor the financial condition of all of them. (TR 534) The agency must rely on sanctions imposed in disciplinary proceedings to help effect voluntary compliance with the Act by respondents and others.

As was stated by the Judicial Officer in *In re Miller*, 33 Agric. Dec. 53, *aff'd sub. nom.*, *Miller v. Butz*, 498 F.2d 1088 (5th Cir. 1974):

"The remedial provisions of a regulatory program would be drastically affected if the agency could consider the effect of sanctions only on the respondents and not on others. It is well recognized that persons regulated by a governmental agency keep abreast of administrative proceedings. The actions of potential violators could be significantly affected by the sanctions imposed against other persons"

In re Miller, 33 Agric. Dec. at 66.

In addition to jeopardizing consignors' proceeds by operating with shortages in the custodial account, Blackfoot used consignors' funds for purposes of its own. By depositing proceeds received from the sale of consigned livestock in its general account, Blackfoot effectively used consignors' funds to finance its operations. There were numerous occasions where there were consignors' funds in Blackfoot's general account when Blackfoot was repaying loans extended to it by its bank.

Blackfoot also engaged in a check exchange or kiting scheme with Uinta which enabled Blackfoot to create an artificial balance in its account by relying on the "float" or the time necessary for the checks and drafts to move through banking channels. The artificial balance gives Blackfoot the potential to buy more livestock than it would be able to if it had to have the funds already available in the account.

Purchasing livestock without having sufficient "real" funds as opposed to "paper money" (TR 371, 372) obviously poses an increased risk that the sellers would not be paid should the check-kiting scheme collapse. In this case, the sellers were not harmed because Blackfoot abruptly stopped the scheme leaving Uinta's bank to suffer the loss of \$800,000.00. Had the bank first discovered the check-kiting and stopped honoring checks or drafts, the loss would very likely have been shifted to livestock sellers/cattlemen.

value for their livestock. See, e.g., *In re Smithfield Livestock Market, Inc.*, 36 Agric. Dec. at 1563.

Blackfoot introduced evidence that a suspension of its operations would not harm it or its owners, but would adversely affect the people it serves. (TR 735) Such an argument has no merit. Respondent's own witnesses indicated that there were numerous other markets in the area where producers can sell their livestock—seven (7) in the immediate area (RX 153; TR 649) and 49 others available to the sellers. (TR 464)

Moreover, in *In re Red River Livestock Auction Inc.*, 36 Agric. Dec. 980, 989 (1977), the Judicial Officer stated that “the argument as to the hardship to the community resulting from a suspension order has repeatedly been rejected in determining sanctions under the Act.” See also, *In re Cordele Livestock Co.*, 36 Agric. Dec. 1114, 1128-29 (1977), *aff'd per curiam* (unpublished), 575 F.2d 879 (5th Cir. 1978).

Operating while insolvent and while its custodial account was not in balance, using custodial funds for purposes of its own, engaging in a check-kiting scheme, and purchasing livestock out of consignment for speculative resale demonstrates clearly that Blackfoot deliberately and wilfully placed its own interests ahead of those of its consignors and others in the livestock industry with whom it dealt. These practices go to the essence of a market agency's responsibilities. Respondent has repeatedly demonstrated an indifference to, if not outright contempt for, its mandated responsibilities.

Consideration has been given to the fact that the investigation did not show that any of respondent's checks or drafts were ever rejected for insufficient funds by the processing banks. Also, respondent points out that none of its livestock sellers ever went unpaid for livestock sold to respondent.

Respondent also had a significant line of credit (1 million dollars) and its officers had substantial personal assets. The fact that respondent cooperated with investigators and produced records and employees to explain them has also been considered. Respondent notes that there were no complaints filed by industry people against respondent. Also, respondent did not conceal anything from the investigators.

Respondent also capitalizes on the fact that it has operated its accounting system in the fashion described here for a long time without prior complaints.

However, these matters individually and cumulatively do not carry great weight.

It is also noted that respondent has stonewalled throughout these formal proceedings in the face of strong, clear, persuasive evidence

of the violations. Respondent refuses to recognize its deficiencies and attempts to put complainant's witnesses on trial.

The evidence here on all points is both clear and convincing; each of the violations and it is almost beyond a reasonable doubt with reference to the check-kiting, insolvency and custodial account violations, if, in fact, it is not beyond a reasonable doubt on those points. The standard preponderance of the evidence is more than met in every instance here.

Respondent has violated sections 307, 312(a) and 409(a) of the A (7 USC §§ 208, 213(a), 228(b), and sections 201.42, 201.43(b) and 201.57(a) of the regulations (9 CFR §§ 201.42, 201.43(b), 201.57(a)), alleged.

The requested cease and desist order and suspension is appropriate, necessary, and well justified.

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Leaving aside the check-kiting violations, the 35-day suspension order issued by the ALJ would have been very modest for the other violations, particularly since respondent had received prior warning letters as to the other violations. However, the check-kiting violations are so serious by themselves that they warrant more than the 6-month suspension being imposed.

The check-kiting violations involved more than 75 drafts (or corresponding checks) issued from January 7, 1981, through May 20, 1981, totalling \$8.6 million. As the ALJ explains, there is a possibility that this could have been regarded by Blackfoot (the Uinta) as a financing arrangement rather than a check-kiting arrangement. Neither Blackfoot nor Uinta had sufficient funds to have the checks and drafts honored except for the "float" generated by the phony paper previously issued by Blackfoot and Uinta.

In addition, as explained by the ALJ, Blackfoot could hardly have believed that it was financing Uinta since Blackfoot usually deposited Uinta's check in Blackfoot's account on the same day (or 1 to 4 days *earlier*) than Blackfoot paid the corresponding draft. To illustrate, the following table shows the dates on which Blackfoot drafts were deposited by Uinta with Zion Bank (which gave

⁷ Drafts were also drawn on Blackfoot payable to a number of persons and firms other than Uinta, and Blackfoot would pay for a number of drafts by a single check drawn from Blackfoot's General Account payable to its bank. For example, Blackfoot's General Account bank statement shows that on January 13, 1981, Blackfoot issued a check for \$358,868.96 (CX 17G, p. 1) (left-hand column, 10th item down). That check paid for draft No. 4449 to Uinta for \$217,472.32 issued on January 1981 (CX 17B, p. 1), discussed by the ALJ, and seven other drafts not involving Uinta (CX 17F, p. 1).

Uinta immediate credit for the drafts), the amount of the Blackfoot drafts to Uinta, the dates on which Blackfoot paid (by its check) the drafts drawn payable to Uinta, the dates on which Blackfoot deposited Uinta's corresponding checks (drawn on Zion Bank), the number of "plus" days, i.e., the number of days between Blackfoot's payment of the drafts and Blackfoot's *later deposit* of the corresponding Uinta checks, and the number of "minus" days, i.e., the number of days between Blackfoot's deposit of the corresponding Uinta checks and Blackfoot's *later payment* of the drafts (see CX 17A; Tr. 261-78). (Where there are zeros, Blackfoot paid the drafts on the same day it deposited the corresponding Uinta checks.)

1	2	3	4	5	6
Draft Deposit- ed by Uinta (1981)	Amount of Blackfoot Draft Payable to Uinta	Date Black- foot Paid Draft by Check	Date Blackfoot Deposited Corre- sponding Uinta Check	Number of "Plus" Days (Col. 4 Minus Col. 3)	Number of "Minus" Days (Col. 4 Minus Col. 3)
1/7	\$217,472.32	1/12	1/12	0	0
1/8	209,347 75	1/13	1/16	3	
1/14	227,468 35	1/19	1/22	3	
1/20	256,495 36	1/23	2/2	10	
1/27	216,743 88	2/2	2/10	8	
2/5	84,561.35	2/10	2/19	9	
2/5	42,614 60	2/10	2/13	3	
2/5	89,313.40	2/10	2/23	13	
2/5	43,656 00	2/10	2/13	13	
2/23	93,593 44	2/26	2/26	0	0
2/24	55,500 00	2/27	2/26		1
2/25	56,286.82	3/2	2/27		3
2/25	104,427.93	3/2	2/27		3
2/26	47,500.00	3/4	3/2		2
2/27	49,000.00	3/4	3/5	1	
3/3	160,000.00	3/6	3/5		1
3/4	165,502.00	3/9	3/6		3
3/6	62,500.00	3/11	3/10		1
3/6	20,233 17	3/13	4/6	25	
3/10	131,605.44	3/13	3/13	0	0
3/10	89,747.33	3/13	3/13	0	0
3/10	103,437.86	3/13	3/13	0	0
3/10	106,814.81	3/13	3/13	0	0
3/12	25,000.00	3/17	3/16		1
3/12	105,925.08	3/17	3/16		1
3/17	99,498.00	3/23	3/19		4
3/17	165,502.00	3/23	3/19		4
3/18	185,000.00	3/23	3/23	0	0
3/19	96,321.47	3/24	3/23		1
3/24	179,348.97	3/30	3/31	1	
3/24	94,828.79	3/30	3/30	0	0

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1	2	3	4	5	6
Draft Deposited by Uinta (1981)	Amount of Blackfoot Draft Payable to Uinta	Date Black- foot Paid Draft by Check	Date Blackfoot Deposited Corre- sponding Uinta Check	Number of "Plus" Days (Col. 4 Minus Col. 3)	Number of "Minus" Days (Col. 4 Minus Col. 3)
3/26	165,504.43	3/31	3/31	0	0
3/26	110,734.00	3/31	3/31	0	0
4/1	93,105.31	4/6	4/6	0	0
4/2	166,826.30	4/8	4/6		2
4/3	288,401.07	4/8	4/6		2
4/8	48,650.80	4/13	4/13	0	0
4/9	165,502.13	4/14	4/13		1
4/9	197,428.93	4/14	4/13		1
4/9	28,354.07	4/14	4/13		1
4/10	99,567.84	4/15	4/13		2
4/10	68,990.35	4/15	4/13		2
4/13	24,828.53	4/16	4/15		1
4/15	67,455.96	4/20	4/20	0	0
4/15	77,981.37	4/20	4/20	0	0
4/15	72,018.63	4/20	4/20	0	0
4/16	89,731.47	4/21	4/20		1
4/16	67,989.76	4/21	4/20		1
4/16	78,437.92	4/21	4/20		1
4/16	132,809.79	4/21	4/20		1
4/20	19,533.15	4/23			
4/22	214,703.90	4/27	4/27	0	0
4/22	231,514.87	4/27	4/27	0	0
4/22	136,134.74	4/27	4/27	0	0
4/27	40,924.70	4/30	5/4	4	
4/29	60,457.85	5/4	5/4	0	0
4/29	334,264.87	5/4	5/4	0	0
4/29	192,461.70	5/4	5/4	0	0
5/4	74,865.64	5/7	5/7	0	0
5/6	97,971.07	5/11	5/13	2	
5/6	231,514.87	5/11	5/13	2	
5/6	233,336.40	5/11	5/14	3	
5/6	39,979.20	5/11	5/14	3	
5/11	27,337.71	5/14	5/18	4	
5/13	44,768.75	5/18	5/18	0	0
5/15	52,345.75	5/20	5/19		1
5/15	58,818.50	5/20	5/19		1
5/15	25,672.39	5/20	5/19		1
5/15	185,541.20	5/20	5/19		1
5/15	35,376.29	5/20	5/19		1
5/18	329,486.04	5/22	5/21		1
5/19	70,614.11	5/22	5/26	4	
5/20	84,688.94	not hon- ored	5/26		
5/21	91,600.53	5/28	5/26		2

1	2	3	4	5	6
Draft Deposited by Uinta (1981)	Amount of Blackfoot Draft Payable to Uinta	Date Black- foot Paid Draft by Check	Date Blackfoot Deposited Corre- sponding Uinta Check	Number of "Plus" Days (Col 4 Minus Col. 3)	Number of "Minus" Days (Col. 4 Minus Col. 3)
5/21	74,294.87	5/28	5/26		2
5/21	96,515.70	5/28	5/26		2
Total	\$8,629,649 58*				

* Total does not include the dishonored draft of May 20, 1981, for \$84,688.94

On the 18 "Plus" days (Column 5 of the table), Blackfoot could have been regarded as financing Uinta (if Blackfoot had had sufficient funds in its General Account, excluding the check-kiting "float"), since Blackfoot paid the drafts before Blackfoot deposited Uinta's corresponding check.

However, on the 23 days in which zeros appear in Columns 5 and 6 in the table set forth above, and the 33 "Minus" days (Column 6 of the table), Blackfoot could not have been regarded as financing Uinta because Blackfoot either deposited Uinta's check on the same day on which Blackfoot paid the draft payable to Uinta (the "zero" days), or Blackfoot actually had deposited Uinta's check in Blackfoot's General Account from 1 to 4 days *before* Blackfoot paid the corresponding draft (the "Minus" days in Column 6 of the table).

Respondent relies on the fact that Blackfoot was held not liable to Uinta's bank, Zions First National Bank, in a case decided by a United States District Judge (*Zions First National Bank v. Blackfoot Livestock Commission Co.*, Civ. No. C-83-1211W (D. Utah Apr. 16, 1985)). But the case is not only irrelevant, but the findings are more helpful to complainant than to respondent.

In the first place, the District Judge was applying the Uniform Commercial Code—not the Packers and Stockyards Act. In the second place, we do not know whether the District Judge had before him the evidence introduced here showing that Blackfoot was not really financing Uinta but, rather, was engaged in a check-kiting scheme with Uinta. In the third place, the District Judge decided only that Blackfoot was not liable for dishonoring three drafts drawn after Paul Thompson's death on May 17, 1981, *viz.*, a draft for \$84,688.94, dated May 20, 1981, a draft for \$329,486.04, dated May 22, 1981, and a draft for \$469,933.63, dated May 27, 1981. Hence the District Judge did not have before him any issue

as to whether Blackfoot would have been liable for dishonored drafts drawn while Paul Thompson was alive.

Moreover, the Judge's findings show that Paul Thompson, president and one-third owner of Blackfoot, allowed Uinta to draw drafts on Blackfoot and knew that the information about cattle on the face of the drafts was false. Specifically, the District Judge found:

35. From approximately 1977 and until his death, Thompson furnished Blackfoot draft books to Andreassen [of Uinta] and allowed Andreassen, and later Carol Kimball, to draw drafts on Blackfoot which drafts would be deposited in Uinta's bank account and which drafts after being forwarded by Uinta's bank to the Idaho bank would be accepted by Blackfoot. This would be done by the Idaho bank advising Blackfoot that a certain number of drafts in a certain amount had been received for payment and Blackfoot's bookkeeper would then go to the bank and examine the drafts. If the drafts were found to be acceptable the bookkeeper would advise the bank of Blackfoot's acceptance. Blackfoot would then issue its check to the Idaho bank in an amount to cover the drafts.

* * * * *

37. From March 1980 through May 16, 1981, Zions [Uinta's bank] processed many drafts drawn on Blackfoot signed for Uinta by Andreassen or Kimball and all of those drafts were accepted by Blackfoot on its Idaho bank with that bank remitting payment to Zions for Uinta.

38. . . . Andreassen [of Uinta] dealt exclusively on matters between Uinta and Blackfoot with Thompson prior to the latter's death.

* * * * *

41. In approximately early April of 1981 and after Blackfoot had become concerned about various of its practices relating to Uinta, Thompson instructed Andreassen that on any Blackfoot drafts executed by Uinta in the future that there should be listed on the face of the draft a description of the cattle including the number and weight thereof and the name of the seller of the cattle. After being given these instructions, Uinta did thereafter list that information on the face of the drafts.

42. In order to obtain money from Blackfoot to finance Uinta's operations after early April 1981, Andreasen and Kimball listed certain fictitious information about the cattle on the face of the drafts presented to the Idaho bank for Blackfoot and Thompson allowed these drafts to be accepted even though he knew of the fictitious cattle purchase information thereon. Thompson requested this fictitious information for the benefit of satisfying the packers and stockyards law and also for the purpose of deceiving others at Blackfoot. Only Thompson at Blackfoot knew that the information listed on the drafts presented by Uinta was false.

The foregoing findings by the court fully support complainant's position here that Blackfoot, through the actions of Paul Thompson, Blackfoot's vice president and one-third owner, engaged in an unfair and deceptive practice until the time of Thompson's death on May 17, 1981.

The basis for the court's decision in favor of Blackfoot is that after Paul Thompson's death, Uinta had no further authority to draw drafts on Blackfoot without permission, which was not given after May 17, 1981. Specifically, the court found and concluded:

44. Very shortly after the death of Thompson on May 17, 1981, Andreasen [of Uinta] and Lake [of Blackfoot] spoke by telephone. In that conversation, Lake informed Andreasen that Blackfoot would continue to finance Uinta. Andreasen advised Lake that he knew something had to be done and that he acknowledged that if Uinta needed to use any of Blackfoot's money that Andreasen would call Lake and let him know the amount that was needed and get Lake's okay before any further of Blackfoot's money was used. Whatever authority Andreasen or others at Uinta had to issue drafts on Blackfoot granted by Thompson terminated on the latter's death and the authority Uinta had after the conversation between Lake and Andreasen was conditioned on Uinta's obtaining approval from Blackfoot before writing drafts on its account.

45. Following this conversation on or about May 17, 1981 between Lake and Andreasen, the First, Second and Third Drafts referred to elsewhere in these Findings [which were the only drafts at issue in the court proceeding] were signed by Carol Kimball payable to the order of Uinta drawn on Blackfoot payable through the Idaho bank and deposited with Zions. At the time these three drafts were

deposited with Zions and at all times thereafter until the acceptance was refused by Blackfoot, neither Kimball nor Andreasen nor anyone else with Uinta had sought or received from Lake or anyone else at Blackfoot agreement that such drafts would be accepted by Blackfoot when presented to its Idaho bank. To the extent it is relevant to any issue in this case, no person at Uinta after May 1, 1981, had any authority either express, apparent or implied to bind Blackfoot to acceptance on any drafts issued on that company.

* * * * *

51. On or about May 26, 1981, Lake and Ellis of Blackfoot became suspicious for the first time about Uinta's activities in using their drafts, and instructed the Idaho bank not to accept or pay on the First and Second Drafts.

52. On or about May 26, 1981, the Idaho bank, following an instruction of non-acceptance by Blackfoot, refused to pay the First and Second Drafts and pursuant to that instruction thereafter refused to pay the Third Draft.

53. Blackfoot did not act in bad faith in connection with its handling of its arrangement with Uinta.

54. Blackfoot had no intent to deceive or harm Zions.

* * * * *

4. Blackfoot did not sign the drafts within the meaning of UCC § 3-403(1).

5. Blackfoot is not the drawer of the drafts because Kimball did not have actual authority to sign the three drafts.

* * * * *

7. Blackfoot has no liability on the three drafts in question in this case.

8. Blackfoot is not estopped to refuse to accept the three drafts.

* * * * *

11. By its course of conduct in accepting drafts prior to May 20, 1981, Blackfoot made no actionable misrepresentation.

tion to Zions regarding the nature of its relationship with Uinta, the terms of its financing arrangement with Uinta or its actions with respect to accepting drafts in the future.

* * * * *

14. Blackfoot committed no fraud upon Zions either actual or constructive as it relates to the three drafts in question.

Although I infer from the record here that Lake, who supervised the maintenance of respondent's books and records and had an extensive accounting background, knew that respondent was engaging in a check-kiting arrangement with Uinta, and did not first become suspicious about the arrangement on May 26, 1981 (when Blackfoot dishonored the First and Second Drafts involved in the court litigation), Lake's prior knowledge is totally irrelevant in this disciplinary proceeding. Under the Packers and Stockyards Act, the "act, omission, or failure of any agent, officer, or other person acting for or employed by" any registrant, "within the scope of his employment or office, shall in every case also be deemed the act, omission, or failure" of such registrant (7 U.S.C. § 223). Accordingly, as the ALJ concluded, Blackfoot is fully responsible for the unfair and deceptive practices involved here even if Paul Thompson were the only individual who had knowledge of the check-kiting arrangement.

Furthermore, the fact that Paul Thompson is now deceased is not a mitigating circumstance which would lessen the sanction imposed on the corporation (even if he were the only one with knowledge of the check-kiting arrangement). This Department has repeatedly refused to lessen the sanction because a principal was unaware of the actions of its agents, or violations by a corporation were caused by one individual who is no longer with the corporation. *In re Veg-Mix, Inc.*, 44 Agric. Dec. ____ (Aug. 21, 1985), *appeal docketed*, No. 85-1771 (D.C. Cir. Nov. 22, 1985); *In re Old Virginia, Inc.*, 42 Agric. Dec. 270, 273 (1983); *In re Esposito*, 38 Agric. Dec. 613, 621-22 (1979). For example, in *In re Veg-Mix, Inc.*, *supra*, it is stated (slip op. at 27):

The case here is, in some respects, similar to *In re Old Virginia, Inc.*, 42 Agric. Dec. 270, 272-73 (1983), in which certain persons caused payment violations by a corporation, and then skipped out, causing other innocent persons who were "responsibly connected" (7 U.S.C. § 499a(9)) with the corporation to be adversely affected by the disciplinary order issued against the corporation. But anyone who be-

comes responsibly connected with a firm subject to the Perishable Agricultural Commodities Act takes the risk that he or she will be adversely affected if the firm fails to pay for produce. That is an unfortunate consequence that is necessary if the remedial purposes of the Act are to be achieved.

Similarly, in *In re Old Virginia, Inc.*, 42 Agric. Dec. 270, 7 (1983), it is stated:

Respondent argued in its original brief, pages 8-13, that the corporate veil should be pierced, and that an order should be issued only against the guilty individuals who managed the corporation, rather than against the corporation.

However, the "doctrine of piercing the corporate veil is a sword—not a shield." *In re Casca*, 34 Agric. Dec. 1917, 1933 (1975). It may be used to prevent a person from using the corporate fiction as a shield to escape the statutory penalty for misconduct, but not to protect a person (individual or corporate) from the statutory penalty for misconduct. *Id.* 1930-33.

It should be noted that it makes no difference in this disciplinary proceeding whether the names written on the drafts purporting to represent livestock sellers were phony or not, or whether Paul Thompson knew that they were phony. Carol Kimball, who wrote the names on the Blackfoot drafts, testified that many of the names were phony, and that Thompson knew that phony names were being used. For example, with respect to the names on Draft No. 2760 dated April 16, 1981 (CX 17B, p. 90), Nielsen is Ms. Kimball's karate instructor, Dunmor is her girlfriend, and Foster is made up (Tr. 320-21). On Draft No. 2830 dated May 6, 1981 (CX 17B, p. 113), the name Jensen is a town, Paulus is Ms. Kimball's sister's married name, and Buffrey is her mother's maiden name (Tr. 321-23). (That draft not only gives the names of the three individuals but, also, gives the number of head and weight of the steers and heifers purportedly involved in the transaction.) But irrespective of whether the drafts were issued to enable Uinta to buy livestock or to enable Uinta to cover overdrafts in its bank account, respondent's violations are just as serious because respondent was not actually financing Uinta but was merely kiting checks with Uinta. (Since the check-kiting scheme was in connection with respondent's livestock business, the violations are, of course, subject to the Act.)

It should be further noted that respondent's check-kiting arrangement with Uinta was a serious and flagrant violation of the Act not because of the actual loss that may have occurred as a result of the arrangement,⁸ but, rather, because a check-kiting arrangement of that size over an extended period of time has the potential for great harm. Considering the severe consequences that could result to livestock sellers or other innocent parties as a result of a check-kiting arrangement of the size and scope involved here, a suspension order of more than 6 months would be appropriate to serve as an effective deterrent against similar violations not only to respondent, but, also, to other potential violators.

It is the policy of this Department to impose severe sanctions for serious violations of any of the regulatory programs administered by the Department to serve as an effective deterrent not only to the respondents, but also to other potential violators. This policy has been followed in all of the Department's disciplinary proceedings in recent years.

The basis for the Department's severe sanction policy is set forth at great length in numerous decisions, e.g., *In re Worsley*, 33 Agric. Dec. 1547, 1556-71 (1974),⁹ which is set forth as Appendix A to this decision.¹⁰ The Department's sanction policy is also discussed at length in *In re Esposito*, 38 Agric. Dec. 613, 624-65 (1979).

⁸ The synopsis of complainant's Investigation Report, introduced by respondent, states that Uinta went out of business owing about \$1 million, of which nearly \$200,000 was owed to livestock sellers (RX 101, p. 7). We have no way of knowing how much of the loss, if any, was caused by the check-kiting arrangement with respondent.

⁹ The Department's severe sanction policy did not originate with *Worsley*, but, rather, was mentioned briefly in the first decision issued by the present Judicial Officer, *In re Henner*, 30 Agric. Dec. 1151, 1263-64 (1971), and was further developed in numerous other decisions before it was finalized in *In re Miller*, 33 Agric. Dec. 53, 64-80 (1974), *aff'd per curiam*, 498 F.2d 1088 (5th Cir. 1974).

¹⁰ Severe sanctions issued pursuant to the Department's severe sanction policy were sustained, e.g., in *In re Collier*, 38 Agric. Dec. 957, 971-72 (1979), *aff'd per curiam* (unpublished), 624 F.2d 190 (9th Cir. 1980); *In re Gold Bell-I&S Jersey Farms, Inc.*, 37 Agric. Dec. 1336, 1362-63 (1978), *aff'd*, No. 78-3134 (D.N.J. May 25, 1979), *aff'd mem.*, 614 F.2d 770 (3d Cir. 1980); *In re Muehlenthaler*, 37 Agric. Dec. 313, 330-32, 337-52, *aff'd mem.*, 590 F.2d 340 (8th Cir. 1978); *In re Mid-States Livestock, Inc.*, 37 Agric. Dec. 547, 549-51 (1977), *aff'd sub nom. Van Wyk v. Bergland*, 570 F.2d 701 (8th Cir. 1978); *In re Cordele Livestock Co.*, 36 Agric. Dec. 1114, 1133-34 (1977), *aff'd per curiam* (unpublished), 575 F.2d 879 (5th Cir. 1978); *In re Livestock Marketers, Inc.*, 35 Agric. Dec. 1552, 1561 (1976), *aff'd per curiam*, 558 F.2d 748 (5th Cir. 1977), *cert. denied*, 435 U.S. 968 (1978); *In re Catanzaro*, 35 Agric. Dec. 26, 31-32 (1976), *aff'd*, No. 76-1613 (9th Cir. Mar. 9, 1977), *printed in* 36 Agric. Dec. 467; *In re Maine Potato Growers, Inc.*, 34 Agric. Dec. 773, 796, 801 (1975), *aff'd*, 540 F.2d 518 (1st Cir. 1976); *In re M. & H. Produce Co.*, 34 Agric. Dec. 700, 750, 762 (1975), *aff'd*, 549 F.2d

Complainant originally recommended a 35-day suspension of respondent's registration, and that recommendation was adopted by the ALJ. However, on respondent's appeal, the Judicial Officer *sponte* raised the issue as to whether the suspension period should be substantially increased because the suspension period seems far out of line with the Department's sanction policy.

In its brief responding to the issue raised by the Judicial Officer as to whether the suspension period should be substantially increased, complainant continues to recommend a 35-day suspension period. Although complainant now recognizes that a check-kiting scheme "would normally warrant a suspension for a minimum of six months," and states that "[w]ere this case to be brought to the complainant would likely seek a suspension greater than 35 days." (Complainant's Brief at 4), complainant continues to recommend a 35-day suspension period here for a number of reasons.

First, complainant relies on the fact that complainant advised respondent of the sanction it would seek if a hearing were held, and this is a factor which respondents consider in deciding whether to settle a case. However, respondents should know (or guess) that the recommendation of complainant as to a sanction, although entitled to great weight, is not controlling. Although the Judicial Officer for many years adhered to the self-imposed limitation that he would never increase the sanction requested by administrative officials, in 1981 he overruled that portion of the Department's sanction policy which provided that the Judicial Officer would never increase the sanction recommended by administrative officials (in order to achieve uniformity in sanctions for comparable violations). *In re Rowland*, 40 Agric. Dec. 1934, 1952 (1981), *aff'd*, 13 F.2d 179 (6th Cir. 1983). Accordingly, at the time the complainant's brief was issued in this case in 1983, a respondent had no guarantee that the Judicial Officer would not increase a sanction recommended by complainant.

Furthermore, the Judicial Officer had long before announced the view that in any case in which the Judicial Officer determines that the sanctions previously imposed for similar violations are not adequate under present circumstances to effectuate the purposes of the regulatory program, a more severe sanction would be imposed.

830 (D.C. Cir.), *cert. denied*, 434 U.S. 920 (1977); *In re Southwest Produce, Inc.*, 34 Agric. Dec. 160, 171, 178, *aff'd per curiam*, 524 F.2d 977 (5th Cir. 1975); *In re J. A. Uedo & Sons*, 34 Agric. Dec. 120, 133, 145-60, *aff'd per curiam*, 524 F.2d 977 (5th Cir. 1975); *In re Marvin Tragash Co.*, 33 Agric. Dec. 1884, 1913-14 (1974), *aff'd*, 524 F.2d 1255 (5th Cir. 1975); *In re Trenton Livestock, Inc.*, 33 Agric. Dec. 499, 515, 539-50 (1974), *aff'd per curiam* (unpublished), 510 F.2d 966 (4th Cir. 1975); *In re Miller*, 31 Agric. Dec. 53, 64-80, *aff'd per curiam*, 498 F.2d 1088, 1089 (5th Cir. 1974).

in the pending case, rather than merely announce that in future cases the sanction would be increased. *In re Worsley*, 33 Agric. Dec. 1547, 1569-70 (1974) (Appendix A at 22a-26a).

Accordingly, I give no weight to the facts that complainant's sanction policy in effect when this complaint was brought did not provide for a lengthy suspension order, and that complainant advised respondent prior to the hearing as to the sanction complainant would seek.

Complainant also considered three other "mitigating" circumstances when it originally decided to recommend a 35-day suspension period. First, complainant states (Complainant's Brief at 4-5):

While the evidence introduced at the oral hearing clearly showed that Dennis Lake, as the owner with the accounting background, must have been and was aware of the check-kiting scheme, Paul Thompson was obviously the official most intimately involved with the scheme. Mr. Thompson died prior to the complaint being issued and while Blackfoot is responsible for his actions, a severe sanction for the check-kiting would not punish the most involved perpetrator.

However, for the reasons set forth above, it would be inconsistent with prior decisions to give any weight to that circumstance.

Complainant also states (Complainant's Brief at 5):

Another factor was the Uinta Livestock Commission Company, the other participant in the scheme, was never charged because the evidence of the scheme was not discovered until months after Uinta's demise and it was determined that no useful purpose would be served by including a defunct and bankrupt corporation as a respondent.

The fact that a proceeding was not brought against Uinta is not a relevant consideration here, and to use that circumstance as a basis for reducing the sanction imposed here would be contrary to the Department's settled policy to impose severe sanctions for serious violations to serve as an effective deterrent to the respondent and to other potential violators.

Complainant further states (Complainant's Brief at 5):

Still another factor was that the ultimate victim of the scheme was the Zions First National Bank, which was at the time vigorously seeking redress against Blackfoot in federal district court.

This, again, is not a circumstance that would be consistent with the Department's sanction policy, and, in addition, Zion was unsuccessful in its action against Blackfoot.

Complainant further states that "[s]uspending an auction market inevitably hurts local consignors" (Complainant's Brief at 5), but it has consistently been held that any hardship to the respondent's community, customers, or employees which might result from a suspension order is given no weight in determining the sanction since the national interest of having fair and competitive conditions in the livestock and meat industries prevails over the local interests which might be temporarily damaged as a result of a suspension order.¹¹ (In addition, Mr. Kienow, Regional Supervisor of Complainant's Omaha office, testified that there were seven other auction markets in the Blackfoot region that were competitors of Blackfoot (Tr. 464)).

Complainant cites a number of consent decisions involving check-kiting schemes in which the suspension period varied from 30 days (held in abeyance) to 4 months (Complainant's Brief at 5). But it is well settled that consent decisions are given no weight in determining sanctions in litigated cases. *In re Worsley*, 33 Agric. Dec. 1547, 1569 (1974) (Appendix A at 23a-24a). In the only contested case cited by complainant, a 90-day suspension order was imposed. *In re Amaral & Brazil*, 36 Agric. Dec. 872, 894 (1977). However, in the most recent check-swapping case, *In re Farmers & Ranchers Live stock Auction, Inc.*, 45 Agric. Dec. ____ (Feb. 27, 1986), a 5-year suspension order was imposed. In that case, as in the present case, there were a number of other violations in addition to the check-kiting violations, but, in view of the similarity between this case and *Farmers & Ranchers*, a suspension order of 1 year or more

¹¹ *In re Gilardi Truck & Transp., Inc.*, 43 Agric. Dec. ____ (Jan. 27, 1984); *In re Oliverio, Jackson, Oliverio, Inc.*, 42 Agric. Dec. ____ (Aug. 31, 1983); *In re Melem Beene Produce Co.*, 41 Agric. Dec. 2422, 2441-42 (1982), *aff'd*, 728 F.2d 347 (6th Cir. 1984); *In re Powell*, 41 Agric. Dec. 1354, 1365 (1982); *In re VPC, Inc.*, 41 Agric. Dec. 734, 746 n 6 (1982); *In re Hatcher*, 41 Agric. Dec. 662, 670-71 (1982); *In re Gus Z. Lancaster Stock Yards, Inc.*, 38 Agric. Dec. 824, 825 (1979); *In re Sol Salins, Inc.*, 37 Agric. Dec. 1699, 1737-38 (1978); *In re Arab Stock Yard, Inc.*, 37 Agric. Dec. 293, 302, 311, *aff'd mem.*, 582 F.2d 39 (5th Cir. 1978); *In re Cordele Livestock Co.*, 36 Agric. Dec. 1114, 1128-29, 1136 (1977), *aff'd per curiam* (unpublished), 575 F.2d 879 (5th Cir. 1978); *In re Red River Livestock Auction, Inc.*, 36 Agric. Dec. 980, 989-90 (1977); *In re Livestock Marketers, Inc.*, 35 Agric. Dec. 1552, 1562 (1976), *aff'd per curiam*, 558 F.2d 748 (5th Cir. 1977), *cert. denied*, 435 U.S. 968 (1978); *In re Overland Stockyards, Inc.*, 34 Agric. Dec. 1808, 1851-52 (1975); and see *In re L.R. Morris Produce Exch., Inc.*, 37 Agric. Dec. 1112, 1120-21 (1978); *In re Armour & Co.*, 37 Agric. Dec. 109, 112 (1978); *In re Catanzaro*, 35 Agric. Dec. 26, 34-35 (1976), *aff'd* No. 76-1613 (9th Cir. Mar. 9, 1977), *printed in* 36 Agric. Dec. 467 (1977).

would have to be imposed in the present case to be consistent with *Farmers & Ranchers*. However, in deference to complainant's continued recommendation for a lenient sanction in this case, and since this issue is raised *sua sponte* by the Judicial Officer on respondent's appeal, only a 6-month suspension order will be imposed here.

In respondent's brief as to the issues raised *sua sponte* by the Judicial Officer, respondent contends that the findings by the district court in *Zions*, discussed above, to the effect that Blackfoot was engaged in a financing arrangement with Uinta, are *res judicata*. However, the Department was not a party to the action brought by Zions First National Bank against Blackfoot Livestock Commission Company and, therefore, the action cannot be binding against the Department in this administrative proceeding. In addition, as set forth above, we do not know whether the district judge had before him the massive evidence that we have here showing that Blackfoot was engaged in a check-kiting scheme, rather than a financing arrangement. Moreover, as shown above, the district court's findings are fully supportive of complainant's position here that Blackfoot was engaging in an unfair and deceptive practice in violation of the Packers and Stockyards Act. Accordingly, the record fully supports the increase in the suspension period, which issue was raised *sua sponte* by the Judicial Officer.

The Department's practice which permits the Judicial Officer to increase *sua sponte* the sanction on respondent's appeal is stated in Campbell, "The Packers and Stockyards Act Regulatory Program," 1 Davidson, *Agricultural Law*, § 3.24 (1981 and Aug. 1985 Supp.), as follows:

In addition, the judicial officer may raise additional issues on appeal *sua sponte* with notice to the parties [footnote omitted]. In one case, in which the judge suspended a registrant for 30 days, and the respondent appealed seeking to reduce the sanction, the judicial officer *sua sponte* raised the issue of whether the suspension should be for a longer period, and ultimately suspended the registrant for 60 days.¹⁴⁹

An appeal filed by a party cannot be withdrawn as a matter of right [footnote omitted]. Accordingly, a respondent planning to file an appeal in a case in which complainant does not appeal should consider whether the sanction in the initial decision is consistent with the sanctions imposed by the judicial officer in previous cases. The present judicial officer has frequently increased sanctions on

appeal [footnote omitted], but has only rarely reduced sanctions on appeal [footnote omitted].

¹⁴⁹ *In re Mid-States Livestock, Inc.*, 37 Agric Dec 547, 549-52 (1977), *aff'd sua nom Van Wyk v Bergland*, 570 F2d 701 (8th Cir 1978). However, that action was taken only because the sanction originally imposed was "so far out of line" with what the judicial officer regarded as appropriate. *In re Esposito*, 38 Agric Dec 613, 623 n 7 (1979), and see *In re Unionville Sales Co.*, 38 Agric Dec 1207, 1207-10 (1979) (remand order), *final decision*, 40 Agric Dec 736 (1981). *In re Rowland*, 40 Agric Dec 1934, 1952-53 (1981), *aff'd*, 713 F2d 179 (6th Cir 1983). It does not violate due process or the equal protection clause of the Constitution for the judicial officer to increase the sanction when the respondent appeals, either *sua sponte* or at the request of complainant in its response to respondent's appeal. *In re Thornton*, 41 Agric Dec 870, 909-12 (1982), *aff'd*, 715 F2d 1508 (11th Cir 1983).

The authority of the Judicial Officer to raise the issue *sua sponte* as to whether the sanction should be increased, when only the respondent appeals, stems from the rules of practice, which provide (7 CFR § 1.145(e)):

(e) *Scope of Argument.* Argument to be heard on appeal, whether oral or on brief, shall be limited to the issues raised in the appeal or in the response to the appeal, except that if the Judicial Officer determines that additional issues should be argued, the parties shall be given reasonable notice of such determination, so as to permit preparation of adequate arguments on all issues to be argued.

The authority of the Judicial Officer to increase *sua sponte* the sanction on respondent's appeal has been very sparingly exercised. It was never exercised during the 30 years the Department's first Judicial Officer served in this position, and it has been exercised on only two other occasions during the 15 years the present Judicial Officer has served in this position. On the first occasion in *Mid-States*, referred to in the preceding quotation, the sanction was increased from 30 days to 60 days by the Judicial Officer. On the other occasion, although the Judicial Officer *sua sponte* raised the issue as to whether the sanction should be increased under certain factual circumstances, he also explained that the sanction should be reduced under other factual circumstances. He remanded the case to the ALJ to determine the facts, which ultimately resulted in a *reduction* in the sanction. *In re Unionville Sales Co.*, 38 Agric. Dec. 1207, 1209-10 (1979) (remand order), *final decision*, 40 Agric. Dec. 736 (1981).¹²

¹² In three other cases, the Judicial Officer increased the sanction on respondent's appeal because complainant had filed a cross-appeal in each case. In the latter

In *Thornton v. USDA*, 715 F.2d 1508, 1512-13 (11th Cir. 1983), the court expressly held that the Judicial Officer has the power to increase the sanction where respondent has appealed. The court held (*id.*):

III. PENALTY ENHANCEMENT

Relying upon the rationale of *North Carolina v. Pearce*, 395 U.S. 711, 724, 89 S.Ct. 2072, 2080, 23 L.Ed.2d 656 (1969) ("the imposition of a penalty upon the defendant for having successfully pursued a statutory right of appeal . . . would be . . . a violation of due process of law"), respondent Thornton maintains that the Judicial Officer's enhancement of his penalty to include a one year disqualification violates his fifth amendment right to due process. He reasons that the severe sanction of disqualification is punitive rather than remedial and, because it could not have been imposed upon him had he not exercised his right of appeal, that the disqualification is actually a punishment for having appealed.

We are not persuaded by respondent's argument. To the extent that the disqualification is punitive, it is punishment for the offense of soring and not for the appeal. Under section 8(a) of the Administrative Procedure Act, 5 U.S.C. § 557(b), "On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision." As the ninth circuit recognized in *Containerfreight Transport Co. v. ICC*, 651 F.2d 668, 670 (9th Cir. 1981), the review provision of the Administrative Procedure Act authorizes the agency "to decide all issues *de novo*." The review is actually a species of retrial. The Supreme Court recognized in *North Carolina v. Pearce*, 395 U.S. at 723, 89 S.Ct. at 2079 that a judge "is not constitutionally precluded . . . from imposing a new

two of those cases, the Judicial Officer also *sua sponte* raised the issue as to whether the sanction should be increased as a precautionary tactic in the event that the court should erroneously hold that the issue could not be raised in a cross-appeal. *In re McConnell*, 44 Agric. Dec. ____ (Mar. 8, 1985); *In re Thornton*, 41 Agric. Dec. 870, 900-13 (1982), *aff'd*, 715 F.2d 1508 (11th Cir. 1983). That tactic was utilized since in *In re Wall*, 38 Agric. Dec. 1437 (1979), *aff'd in part and rev'd in part*, No. 79-3714 (6th Cir. July 10, 1981) (unpublished order), *printed in* 40 Agric. Dec. 927 (1981), the court set aside the Judicial Officer's increase of the sanction on the erroneous view that complainant had not filed a cross-appeal. (Since complainant had in fact filed a cross-appeal in *Wall*, the Judicial Officer did not notify the parties that he was *sua sponte* raising any issue as to the sanction.)

sentence, whether greater or less than the original sentence" upon such a retrial. The only constitutional limitation upon this right is that any penalty already suffered prior to retrial must be "credited" towards the subsequent sentence so that the actual penalty imposed does not exceed the maximum limits for a single commission of the offense. *Id.* at 718, 89 S.Ct. at 2077. No such constitutional violation was committed in this case. The disqualification provision is supplementary to, not an alternative for, the imposition of a fine. 15 U.S.C. § 1825(c). It was lawfully imposed by the Judicial Officer.

In *Wall* (note 12, *supra*), the court, in addition to failing to recognize that complainant had filed a cross-appeal, relied upon *North Carolina v. Pearce*, which is distinguished by the court in *Thornton* just quoted. Specifically, the court stated in *Wall* (slip op. at 2-3 reprinted in 40 Agric. Dec. 927, 927-28):

Plaintiff also challenges the propriety of the Secretary's remedial order. After hearing the evidence in this case, the ALJ fined plaintiff \$2,000.00 and ordered him disqualified from exhibiting any horse in a show for a period of two years. Plaintiff appealed the ALJ's decision to the Department of the Agriculture Judicial Officer. No cross-appeal was taken by the Secretary. In his decision, the Judicial Officer enhanced the penalties assessed by the ALJ and ordered plaintiff to pay \$2,000.00 and to be disqualified from exhibiting any horse in a show for a period of five years [the minimum permitted by the statute for a second offense, which was the case here]. Absent notice by cross-appeal that the Secretary sought to augment the remedial order of the ALJ, the Judicial Officer's decision to do so is an abuse of discretion. The ALJ heard the evidence and his findings of fact in support of his remedial order are not clearly erroneous. *Cf. North Carolina v. Pearce*, 395 U.S. 711 (1969) (augmented sentence predicated upon pursuit of statutory right of appeal of criminal conviction is a denial of due process).

The erroneous reliance on *North Carolina v. Pearce* by the court in *Wall* is set forth at greater length by the Judicial Officer *Thornton*, *supra* (41 Agric. Dec. at 909-12):

Finally, the court's reliance in *Wall* on *North Carolina v. Pearce*, 395 U.S. 711 (1969), is misplaced. The Court held in *Pearce* that where a defendant successfully appeals a

criminal conviction and is retried, the "original conviction has, at the defendant's behest, been wholly nullified and the slate wiped clean" (395 U.S. at 721); and, accordingly, there is no constitutional prohibition against increasing the penalty after the new trial (*id.* at 719-23), so long as the defendant is credited with the punishment already exacted on the basis of the original trial (*id.* at 717-19).

To the very limited extent, if any, to which *Pearce* is analogous to *Wall*, the *Pearce* case indicates that when Wall appealed the [ALJ's] initial decision, the slate was "wiped clean" (395 U.S. at 721), the initial decision was no longer in effect, and an increased sanction could constitutionally be imposed (395 U.S. at 719-23).

In *Pearce*, it was argued that the imposition of a more severe sentence upon retrial creates an invidious classification violative of the Equal Protection Clause of the Fourteenth Amendment. (This is analogous to the argument in the present case that the imposition of a more severe sanction after an appeal by a respondent creates an invidious classification upon those who choose to avail themselves of their appellate rights. See Brief and Argument of Respondent Thornton in Opposition to Complainant's Cross Appeal 2-3). In rejecting that argument, the Court held (395 U.S. at 722-23):

The other argument advanced in support of the proposition that the Constitution absolutely forbids the imposition of a more severe sentence upon retrial is grounded upon the Equal Protection Clause of the Fourteenth Amendment. The theory is advanced that, since convicts who do not seek new trials cannot have their sentences increased, it creates an invidious classification to impose that risk only upon those who succeed in getting their original convictions set aside. The argument, while not lacking in ingenuity, cannot withstand close examination. In the first place, we deal here, not with increases in existing sentences, but with the imposition of wholly new sentences after wholly new trials. Putting that conceptual nicety to one side, however, the problem before us simply cannot be rationally dealt with in terms of 'classifications.' A man who is retried after his

first conviction has been set aside may be acquitted. If convicted, he may receive a shorter sentence, he may receive the same sentence, or he may receive a longer sentence than the one originally imposed. The result may depend upon a particular combination of infinite variables peculiar to each individual trial. It simply cannot be said that a State has invidiously 'classified' those who successfully seek new trials, any more than that the State has invidiously 'classified' those prisoners whose convictions are *not* set aside by denying the members of that group the opportunity to be acquitted. To fit the problem of this case into an equal protection framework is a task too Procrustean to be rationally accomplished.

In cases before the Department as in *Pearce* (see 395 U.S. at 722, just quoted), when a respondent appeals to the Judicial Officer, he has the opportunity to have the complaint dismissed (e.g., *In re Hygrade Food Products Corp.*, 35 Agric. Dec. 129 (1976)), to have the sanction drastically reduced (e.g., *In re Alex's Produce*, 41 Agric. Dec. [287] (Feb. 3, 1982)), to receive the same sanction (e.g., *In re Fleming*, 40 Agric. Dec. 1521 (1981), *appeal docketed*, No. 82-3095 (6th Cir. Feb. 1, 1982)), or to have the sanction increased (e.g., *In re Mid-States Livestock, Inc.*, 37 Agric. Dec. 547 (1977), *aff'd sub nom. Van Wyk v. Bergland*, 570 F.2d 701 (8th Cir. 1978)). *Pearce* suggests²¹ that any of those possibilities are permitted by the constitution.

²¹ *Pearce* is not directly in point since *Pearce* deals with a new trial (after appeal) whereas here [i.e., in *Thornton*], as in *Wall*, we are dealing with the same case on the initial appeal.

The concluding part of the decision in *North Carolina v. Pearce*, 395 U.S. 711, 723-26 (1969), which may have been relied on by the court in *Wall*, is not remotely in point or analogous to *Wall*. In that section of the *Pearce* opinion, the Court explains that it is a violation of due process to impose a heavier sentence upon every reconvicted defendant for the explicit purpose of punishing the defendant for having successfully appealed. Specifically, the Court held (395 U.S. at 723-26):

It can hardly be doubted that it would be a flagrant violation of the Fourteenth Amendment for a state trial court to follow an announced practice

of imposing a heavier sentence upon every reconvicted defendant for the explicit purpose of punishing the defendant for his having succeeded in getting his original conviction set aside. . . .

Due process of law, then, requires that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial. And since the fear of such vindictiveness may unconstitutionally deter a defendant's exercise of the right to appeal or collaterally attack his first conviction, due process also requires that a defendant be freed of apprehension of such a retaliatory motivation on the part of the sentencing judge.²⁰ (Footnote omitted).

In order to assure the absence of such a motivation, we have concluded that whenever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear. Those reasons must be based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding. And the factual data upon which the increased sentence is based must be made part of the record, so that the constitutional legitimacy of the increased sentence may be fully reviewed on appeal.

That portion of the Court's opinion in *Pearce* has no relevancy to the present [*Thornton*] case or to the *Wall* case. When the Judicial Officer issued his decision in *Wall*, it was not after *Wall* had appealed an earlier order and had it set aside. Rather, *Wall* was appealing to the Judicial Officer for the first time. Hence there could be no possibility that the Judicial Officer had the motive of punishing the respondent for having succeeded in getting the Judicial Officer's original order set aside.

Furthermore, the concluding part of *North Carolina v. Pearce* merely holds that to assure the absence of motivation to penalize the defendant for having succeeded in getting his original conviction set aside, the judge imposing a more severe sentence after a new trial must affirmatively

show his reasons for doing so. As stated above, the Judicial Officer affirmatively set forth the strongest possible reason for increasing the sanction in *Wall*, viz., the statute requires that any disqualification order for a repeat offender be for a minimum of five years.²²

²² Some of the decisions cited by the Court in *North Carolina v. Pearce*, 395 U.S. 711, 724-25 (1969), refer to the constitutional need not to "chill" the right of appeal. But the cases refer to procedural impediments to appeals, or to substantive policy to punish persons who exercise their right of appeal. No case holds that the constitution is violated merely because the defendant knows from past decisions that a particular judge (or Judicial Officer) imposes severe sanctions for serious violations in every case, irrespective of who appeals. The Judicial Officer will readily concede that it does not take an acute or legally trained mind, or much reading in Agriculture Decisions, to perceive that the present Judicial Officer imposes severe sanctions for serious or repeated violations in every case (generally including minimum disqualification orders in Horse Protection Act cases), so as to achieve the remedial purposes of the regulatory programs administered by the Department of Agriculture. If this uniform policy chills a respondent's desire to appeal, that does not present a constitutional issue. In the present case, respondent Thornton was not deterred from appealing to the Judicial Officer notwithstanding the fact that the Judicial Officer's severe sanction policy, and his application of the policy in Horse Protection Act cases, is set forth fully in *In re Rowland*, 40 Agric. Dec. 1934 (1981), appeal docketed, No. 82-3015 (6th Cir. Jan. 8, 1982), which was attached to Judge Weber's initial decision in the present case.

For the foregoing reasons, there is no procedural impediment to the increase in respondent's sanction by the Judicial Officer.

Respondent urges that the ALJ erred in denying its frequent requests for alleged Jencks Act material, and in failing to perform an *in camera* examination of complainant's documents (see Tr. 91-108, 183-223, 256-57, 304-05, 315-17, 349, 376, 401, 426-27, 464-78, 513-14, 610c-11, 792-98). However, for the reasons stated by the ALJ, no error was committed in this respect. See *In re Machado*, 41 Agric. Dec. ____ (Oct. 20, 1983) (decision as to respondent *Cozzi*, *aff'd*, 749 F.2d 86 (9th Cir. 1984) (attached as Appendix B to this decision).

For the foregoing reasons, the following order should be issued.

ORDER

Respondent Blackfoot Livestock Commission Co., its officers, directors, agents and employees, directly or indirectly through any corporate or other device, shall cease and desist from:

1. Engaging in business as a dealer or market agency while its current liabilities exceed its current assets;
2. Using funds received as proceeds from the sale of livestock sold on a commission basis for purposes of its own or for purposes

other than the payment of lawful marketing charges and the remittance of net proceeds to shippers, and making such other use of shippers' proceeds in its possession or control as well endanger or impair the faithful and prompt accounting therefor and payment of the portions thereof due to the person or persons entitled thereto;

3. Failing to deposit in its "Custodial Account for Shippers' Proceeds," within the time prescribed by section 201.42(c) of the regulations (9 CFR § 201.42(c)), an amount equal to the proceeds receivable from the sale of consigned livestock;

4. Failing to otherwise maintain its "Custodial Account for Shippers' Proceeds" in conformity with the provisions of section 201.42 of the regulations (9 CFR § 201.42);

5. Exchanging drafts or checks with any person for the purpose or with the effect of concealing the true amount of funds available in any checking or other bank account, or of creating a false "float" or balance in any such account;

6. Permitting owners, officers, agents, or employees to buy livestock out of consignment for resale for their own speculative accounts; and

7. Paying for livestock with a draft which is not a check unless the seller expressly agrees in writing before the transaction that payment may be made by such a draft.

Respondent is suspended as a registrant under the Act for a period of 6 months and thereafter until it demonstrates that it is no longer insolvent and that the deficit in its Custodial Account for Shippers' Proceeds has been eliminated. When respondent demonstrates that it is no longer insolvent and that the deficit in its Custodial Account for Shippers' Proceeds has been eliminated, a supplemental order will be issued in this proceeding terminating this suspension after the expiration of the 6-month period.

The cease and desist provisions of this order shall become effective on the day after service of this order on respondent. The suspension provisions shall become effective on the 30th day after service on respondent.

APPENDIX A

Excerpt from *In re Worsley*, 33 Agric. Dec. 1547, 1556-71 (1974).

U.S.D.A. SANCTION POLICY

[Excerpt omitted.—Ed.]

Decision in *In re Machado*, 42 Agric. Dec. 820 (1983) (remanded as to respondent Cozzi), final decisions, 42 Agric. Dec. . . (Oct 1983), *aff'd*, 749 F.2d 36 (9th Cir. 1984) (unpublished).

In re: DWAIN A. WAGONER. P&S Docket No. 6440. Decided May 12, 1986.

William J. Weber, Administrative Law Judge.

Allan Kahan, for complainant

For respondent, *pro se*

CONSENT DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondent wilfully violated the Act and the regulations issued thereunder (9 CFR § 201 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondent admits the jurisdictional allegations in paragraph 1 of the complaint and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Dwain A. Wagoner, hereinafter referred to as respondent, is an individual whose business mailing address is Route #3, Box 363, Idaho Falls, Idaho 83401.

2. Respondent is, and at all times material herein was:

(a) Engaged in the business of buying and selling livestock in commerce for his own account, and buying livestock in commerce on a commission basis; and

(b) Registered with the Secretary of Agriculture as a dealer buying and selling livestock in commerce for his own account and as a market agency buying livestock in commerce on a commission basis.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent Dwain A. Wagoner, individually or through any corporate or other device, in connection with his activities subject to the Packers and Stockyards Act, shall cease and desist from engaging in business in any capacity for which bonding is required under the Packers and Stockyards Act, as amended and supplemented, and the regulations, without filing and maintaining a reasonable bond or its equivalent, as required by the Act and the regulations.

Respondent is suspended as a registrant under the Act until such time as he complies fully with the bonding requirements under the Act and the regulations. When respondent demonstrates that he is in full compliance with such bonding requirements, a supplemental order will be issued in this proceeding terminating this suspension.

The provisions of this order shall become effective on the sixth day after service of this order on the respondent.

Copies of this decision shall be served upon the parties.

In re: JERRY GOETZ. P&S Docket No. 6599. Decided March 17, 1986.

John A. Campbell, Administrative Law Judge.

Peter Train, for complainant

Lynn Hursh, Overland Park, Kansas, for respondent.

CONSENT DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondent wilfully violated the Act and the regulations issued thereunder (9 CFR § 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondent admits the jurisdictional allegations in paragraph I of the complaint and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Jerry Goetz, hereinafter referred to as the respondent, is an individual whose business mailing address is R. R. 1, Park, Kansas 67751.

2. The respondent is, and at all times material herein was:

(a) Engaged in the business of buying and selling livestock in commerce for his own account and buying livestock in commerce on a commission basis; and

(b) Registered with the Secretary of Agriculture as a market agency to buy livestock in commerce on a commission basis.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent Goetz, his agents, employees and assigns, directly or indirectly through any corporate or other device, shall cease and desist from engaging in business in any capacity for which bonding is required under the Packers and Stockyards Act, as amended and supplemented, and the regulations, without filing and maintaining an adequate bond or its equivalent, as required by the Act and the regulations.

Respondent is suspended as a registrant under the Act until he complies with the bonding requirements under the Act and the regulations. When respondent demonstrates that he is in full compliance with such bonding requirements, a supplemental order will be issued in this proceeding terminating this suspension.

In accordance with section 312(b) of the Act (7 U.S.C. § 213(b)), respondent is hereby assessed a civil penalty in the amount of Five Hundred Dollars (\$500.00).

The provisions of this order shall become effective on the sixth day after service of this decision on the respondent.

Copies of this decision shall be served on the parties.

In re: RICK LUNDT and LUNDT, INC. P&S Docket No. 6584. Decided
March 20, 1986.

Edward H. McGrath, Administrative Law Judge
Allan Kahan, for complainant
For respondent, *pro se*

CONSENT DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondents wilfully violated the Act and the regulations issued thereunder (9 CFR § 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondents admit the jurisdictional allegations in paragraph I of the complaint and specifically admit that the Secretary has jurisdiction in this matter, neither admit nor deny the remaining allegations, waive oral hearing and further procedure, and consent and agree, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Lundt, Inc., hereinafter referred to as the corporate respondent, is a corporation organized and existing in the State of Kansas. Corporate respondent's business mailing address is 2411 Sue Lane, Independence, Kansas 67301.

2. The corporate respondent is, and at all times material herein was:

(a) Engaged in the business of a market agency buying livestock in commerce on a commission basis; and

(b) Not registered with the Secretary.

3. Rick Lundt, hereinafter referred to as the individual respondent, is an individual whose mailing address is 2411 Sue Lane, Independence, Kansas 67301.

4. The individual respondent is, and at all times material herein was:

(a) Responsible for the direction, management and control of the corporate respondent;

(b) Engaged in the business of a market agency buying livestock in commerce on a commission basis; and

(c) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce for his own account.

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CONCLUSIONS

The respondents having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent Rick Lundt, his agents and employees, directly or through any corporate or other device, and respondent Lundt, Inc., its officers, directors, agents, employees, successors and assigns, in connection with their business subject to the Act, shall cease and desist from engaging in business in any capacity for which bonding is required under the Packers and Stockyards Act, as amended and supplemented, and the regulations, without filing and maintaining a reasonable bond or its equivalent, as required by the Act and the regulations.

Respondent Rick Lundt is suspended as a registrant under the Act, and respondent Lundt, Inc., is prohibited from operating subject to the Act, until such time as they comply fully with the bonding requirements under the Act and the regulations. When respondents demonstrate that they are in full compliance with such bonding requirements, a supplemental order will be issued in this proceeding terminating this suspension.

In accordance with section 312(b) of the Act (7 U.S.C. § 213(b)), respondents are jointly and severally assessed a civil penalty in the amount of Four Hundred Dollars (\$400.00), which shall be payable by the effective date of this order.

The provisions of this order shall become effective on the sixth day after service of this order on the respondent.

Copies of this decision shall be served upon the parties.

In re: JERRY MENZ and SHARON MENZ d/b/a PUXICO STOCKYARDS & AUCTION Co. P&S Docket No. 6523. Decided March 21, 1986.

*John A. Campbell, Administrative Law Judge
Peter Train, for complainant
Donald Rhodes, Bloomfield, MO, for respondents*

CONSENT DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*), by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the financial condition of the respondents does not meet the requirements of the Act and that the

respondents wilfully violated the Act and the regulations issued thereunder (9 CFR § 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondents admit the jurisdictional allegations in paragraph I of the complaint and specifically admit that the Secretary has jurisdiction in this matter, neither admit nor deny the remaining allegations, waive oral hearing and further procedure, and consent and agree, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Jerry and Sharon Menz, hereinafter referred to as the respondents, are partners doing business as Puxico Stockyards & Auction Company. Respondents' principal place of business is located at Puxico, Missouri, and their business mailing address is Highway 51 North, Puxico, Missouri 63960.

2. The respondents, at all times material herein, were:

(a) Engaged in the business of conducting and operating the Puxico Stockyards & Auction Co. stockyard, a stockyard posted under and subject to the provisions of the Act, herein referred to as the stockyard;

(b) Engaged in the business of a market agency, selling livestock on a commission basis at the stockyard; and

(c) Engaged in the business of a dealer, buying and selling livestock in commerce for their own account.

3. The respondents are, and at all times material herein were, registered with the Secretary of Agriculture as a market agency to sell livestock on a commission basis in commerce, and as a dealer to buy and sell livestock in commerce.

CONCLUSIONS

The respondents having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondents Jerry and Sharon Menz, their agents and employees, directly or through any corporate or other device, shall cease and desist from:

1. Operating while insolvent, *i.e.*, while their current liabilities exceed their current assets;

2. Failing to deposit in their Custodial Account for Shippers' Proceeds, within the times prescribed in section 201.42 of the regulations (9 CFR § 201.42), amounts equal to the proceeds due consignors from the sale of their livestock;

3. Using funds received as proceeds from the sale of consigned livestock for purposes of their own or for any purpose other than the payment of net proceeds to the owners, consignors or shippers of such livestock or the payment of amounts due the respondent for lawful marketing charges;

4. Failing to otherwise maintain their Custodial Account for Shippers' Proceeds in strict conformity with the provisions of section 201.42 of the regulations (9 CFR § 201.42);

5. Issuing checks to consignors in payment of the net proceeds resulting from the sale of their livestock without having and maintaining sufficient funds on deposit and available in the bank account upon which such checks are drawn to pay such checks when presented;

6. Failing to remit, when due, to consignors the net proceeds resulting from the sale of their livestock;

7. Issuing checks in payment for livestock purchases without having and maintaining sufficient funds on deposit and available in the bank account upon which such checks are drawn to pay such checks when presented;

8. Failing to pay, when due, the full purchase price of livestock; and

9. Failing to pay the full purchase price of livestock.

Respondents shall keep and maintain accounts, records and memoranda which fully and correctly disclose all transactions involved in their business subject to the Packers and Stockyards Act including: (1) a general ledger of accounts showing assets, liabilities, income, expenses and net worth; (2) a complete and accurate accounts receivable ledger; (3) a detailed record of all deposits to their custodial account and monthly reconciliations of that account; (4) a complete and accurate record of the purchase and resale of all livestock purchased in support of the market; and (5) a complete and accurate livestock inventory record.

The respondents are suspended as registrants under the Act for 120 days and thereafter until they demonstrate that they are no longer insolvent and that the deficit in their Custodial Account for Shippers' Proceeds has been eliminated. When respondents demonstrate that they are no longer insolvent and that the deficit in their Custodial Account for Shippers' Proceeds has been eliminated, a supplemental order will be issued in this proceeding terminating the suspension after the expiration of the 120-day period.

The provisions of this order shall become effective on the sixth day after service of this decision on the respondents.

Copies of this decision shall be served upon the parties.

In re: VIRGIL P. MILLER and E.K. CORRIGAN CO. P&S Docket No. 6557. Decided March 21, 1986.

Edward H. McGrail, Administrative Law Judge.

Peter Train, for complainant.

Victor J. Lich, Jr., for respondent.

CONSENT DECISION WITH RESPECT TO E.K. CORRIGAN CO.

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondents wilfully violated the Act. This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

Respondent E. K. Corrigan Co. admits the jurisdictional allegations in paragraph I of the complaint as they pertain to it and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. E. K. Corrigan Co., hereinafter referred to as respondent Corrigan, is a corporation whose mailing address is 812 Livestock Exchange Building, Omaha, Nebraska 68107.

2. Respondent Corrigan at all times material herein was:

(a) Engaged in the business of a dealer buying and selling livestock in commerce for its own account and as a market agency buying livestock in commerce on a commission basis, and providing clearing services for others; and

(b) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce for its own account and a market agency buying livestock on a commission basis and providing clearing services.

CONCLUSIONS

Respondent E. K. Corrigan Co. having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent Corrigan, its officers, agents and employees, directly or through any corporate or other device, in connection with its activities subject to the Packers and Stockyards Act, shall not fail to pay for the livestock purchases of its clearees.

In accordance with section 312(b) of the Act (7 U.S.C. § 213(b)), respondent Corrigan is assessed a civil penalty in the amount of one thousand dollars (\$1,000.00).

The provisions of this order shall become effective on the sixth day after service of this decision on respondent.

Copies of this decision shall be served on the parties.

In re: JAEGER'S LIVESTOCK AUCTION MARKET. P&S Docket No. 6511
Decided March 27, 1986.

Edward H. McGrail, Administrative Law Judge.

Roberta Stwartzendruber, for complainant.

Stephen Roseman, Newton, New Jersey, for respondent.

CONSENT DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondent wilfully violates the Act and the regulations issued thereunder (9 CFR § 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondent admits the jurisdictional allegations in paragraph I of the complaint and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Jaegers Livestock Auction Market, hereinafter referred to as the respondent, is a corporation whose principal place of business is located in Sussex, New Jersey. Respondent's mailing address is P. O. Box 345, Sussex, New Jersey 07461.

2. Respondent is, and at all times material herein was:

(a) Engaged in the business of conducting and operating the Jaegers Livestock Auction Market stockyard, a posted stockyard under the Act, hereinafter referred to as the stockyard;

(b) Engaged in the business of selling livestock on a commission basis at the stockyard; and

(c) Registered with the Secretary of Agriculture as a market agency to sell livestock on a commission basis in commerce.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Jaegers Livestock Auction Market, its officers, directors, agents, successors and assigns, directly or through any corporate or other device, in connection with its operations subject to the Packers and Stockyards Act, shall cease and desist from engaging in business in any capacity for which bonding is required under the Act and the regulations without filing and maintaining a reasonable bond or its equivalent, as required by the Act and the regulations.

Insofar as respondent is now in full compliance with the bonding requirements under the Act and the regulations, no suspension is warranted.

In accordance with section 312(b) of the Act (7 U.S.C. § 213(b)), respondent is assessed a civil penalty in the amount of Three Hundred Dollars (\$300.00).

The provisions of this order shall become effective on the sixth day after service of this order on the respondents.

Copies of this decision shall be served upon the parties.

In re: JOHN T. BUFORD. P&S Docket No. 6632. Decided March 1986.

Victor W. Palmer, Administrative Law Judge.

Peter Train, for complainant.

For respondent, *pro se*.

CONSENT DECISION

This proceeding was instituted under the Packers and Stockyard Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondent wilfully violate the Act and the regulations issued thereunder (9 CFR § 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondent admits the jurisdictional allegations in paragraph I of the complaint and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. John T. Buford, hereinafter referred to as the respondent, is an individual whose business mailing address is P. O. Box 447, Celina, Tennessee 38551.

2. The respondent is, and at all times material herein was:

(a) Engaged in the business of buying and selling livestock in commerce for his own account; and

(b) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce for his own account.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent Buford, his agents, employees and assigns, directly or indirectly through any corporate or other device, shall cease and desist from engaging in business in any capacity for which bonding is required under the Packers and Stockyards Act, as amended and supplemented, and the regulations, without filing and maintaining

an adequate bond or its equivalent, as required by the Act and the regulations.

Respondent is suspended as a registrant under the Act until he complies with the bonding requirements under the Act and the regulations. When respondent demonstrates that he is in full compliance with such bonding requirements, a supplemental order will be issued in this proceeding terminating this suspension.

In accordance with section 312(b) of the Act (7 U.S.C. § 213(b)), respondent is hereby assessed a civil penalty in the amount of Two Thousand Dollars (\$2,000.00).

The provisions of this order shall become effective on the sixth day after service of this decision on the respondent.

Copies of this decision shall be served upon the parties.

In re: YUMA MEAT CO. INC., RICHARD LISKA and FRED LUECK. P&S
Docket No. 6636. Decided March 27, 1986.

Edward H. McGrail, Administrative Law Judge.

Roberta Swartzendruber, for complainant

For respondent, *pro se*.

CONSENT DECISION WITH RESPECT TO FRED LUECK

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a Complaint and Notice of Hearing filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondents violated the act. This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

Respondent Lueck admits the jurisdictional allegations in paragraph III of the Complaint and Notice of Hearing and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Fred Lueck, hereinafter referred to as respondent Lueck, is an individual whose business address is 12700 Somerton Avenue, Yuma, Arizona 85365.

2. Respondent Lueck, at all times material herein was:

- (a) Vice President of the corporate respondent;
- (b) Owner, in combination with his wife, of 50% of the outstanding stock of the corporate respondent;
- (c) Responsible, in combination with respondent Liska, for the direction, management and control of the corporate respondent and
- (d) A packer within the meaning of and subject to the provisions of the Act.

CONCLUSIONS

Respondent Lueck having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent Lueck, directly or through any corporate or other device, in connection with his operations subject to the Packers and Stockyards Act, shall cease and desist from:

1. Issuing checks in payment for livestock purchases without having sufficient funds available in the bank account upon which such checks are drawn to pay such checks when presented; and
2. Failing to pay, when due, the full purchase price of livestock.

In accordance with section 203(b) of the Act (7 U.S.C. § 193(b)), respondent Liska is assessed a civil penalty of One Thousand Dollars (\$1,000.00).

Such order shall have the same force and effect as if entered after full hearing and shall be effective on the first day after service upon the respondent.

Copies of this decision shall be served upon the parties.

In re: CLARENCE "BUTCH" BUSSE. P&S Docket No. 6638. Decided March 27, 1986.

William J. Weber, Administrative Law Judge.

Peter Tram, for complainant.

For respondent, *pro se*.

CONSENT DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondent wilfully violated

the Act and the regulations issued thereunder (9 CFR § 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondent admits the jurisdictional allegations in paragraph I of the complaint and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Clarence "Butch" Busse, doing business as Busse Livestock, hereinafter referred to as the respondent, is an individual whose business mailing address is 305 First Street, Prairie du Sac, Wisconsin 53578.

2. The respondent is, and at all times material herein was:

(a) Engaged in the business of buying and selling livestock in commerce for his own account and buying livestock in commerce on a commission basis; and

(b) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce for his own account and as a market agency to buy livestock in commerce on a commission basis.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent Busse, his agents, employees and assigns, directly or indirectly through any corporate or other device, shall cease and desist from:

1. Engaging in business in any capacity for which bonding is required under the Packers and Stockyards Act, as amended and supplemented, and the regulations, without filing and maintaining an adequate bond or its equivalent, as required by the Act and the regulations.

2. Issuing checks in payment for livestock without having and maintaining sufficient funds on deposit and available to pay the checks when presented; and

3. Failing to pay, when due, for livestock purchases.

Respondent is suspended as a registrant under the Act for period of three (3) weeks.

In accordance with section 312(b) of the Act (7 U.S.C. § 213(b)), respondent is hereby assessed a civil penalty in the amount of Three Thousand Dollars (\$3,000.00).

The provisions of this order shall become effective on the sixth day after service of this decision on the respondent.

Copies of this decision shall be served on the parties.

In re: Tom Nix. P&S Docket No. 6656. Decided March 27, 1986.

John M. Campbell, Administrative Law Judge.

Peter Train, for complainant

For respondent, *pro se*

CONSENT DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondent wilfully violated the Act and the regulations issued thereunder (9 CFR § 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondent admits the jurisdictional allegations in paragraph I of the complaint and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Tom Nix, doing business as Tom Nix Cattle Company, hereinafter referred to as the respondent, is an individual whose business mailing address is Route 3, Box 149 Anson, Texas 79501.
2. The respondent is, and at all times material herein was:
 - (a) Engaged in the business of buying and selling livestock in commerce for his own account; and
 - (b) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce for his own account.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent Nix, his agents, employees and assigns, directly or indirectly through any corporate or other device, shall cease and desist from engaging in business in any capacity for which bonding is required under the Packers and Stockyards Act, as amended and supplemented, and the regulations, without filing and maintaining an adequate bond or its equivalent, as required by the Act and the regulations.

In accordance with section 312(b) of the Act (7 U.S.C. § 213(b)), respondent is hereby assessed a civil penalty in the amount of Five Hundred Dollars (\$500.00).

Respondent has demonstrated his present compliance with the bonding requirements of the Act and Regulations. Therefore, no suspension is being imposed.

The provisions of this order shall become effective on the sixth day after service of this decision on the respondent.

Copies of this decision shall be served on the parties.

In re: JIM BEARD, O.W. (WAYNE) GOODALL, MIKE WADE and LEON WALLACE, d/b/a CARROLL COUNTY LIVESTOCK AUCTION Co. P&S
Docket No. 6489. Decided March 31, 1986.

John A. Campbell, Administrative Law Judge.

Ben Bruner, for complainant

Kent Coxsey, for respondent.

CONSENT DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondents wilfully violated the Act and the regulations issued thereunder (9 CFR § 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondents admit the jurisdictional allegations in paragraph I of the complaint and specifically admit that the Secretary has jurisdiction in this matter, neither admit nor deny the remain-

ing allegations, waive oral hearing and further procedure, and consent and agree, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Jim Beard, O.W. (Wayne) Goodall, Mike Wade, and Leon Wallace, doing business as Carroll County Livestock Auction, hereinafter referred to as the respondents, were partners with a business mailing address of P. O. Box 371, Berryville, Arkansas 72616.

2. Respondents at all times material herein were:

(a) Engaged in the business of conducting and operating the Carroll County Livestock Auction Co. stockyard, a posted stockyard; under the Act, hereinafter referred to as the stockyard;

(b) Engaged in the business of selling livestock on a commission basis at the stockyard; and

(c) Registered with the Secretary of Agriculture as a marketing agency to sell livestock on a commission basis in commerce.

CONCLUSIONS

The respondents having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondents Jim Beard, O.W. (Wayne) Goodall, Mike Wade, and their agents and employees, directly or through any corporate or other device, shall cease and desist from engaging in business in any capacity for which bonding is required under the Packers and Stockyards Act, as amended and supplemented, and the regulations, without filing and maintaining a reasonable bond or its equivalent, as required by the Act and the regulations.

In accordance with section 312(b) and the Act (7 U.S.C. § 213(b)), respondents are jointly and severally assessed a civil penalty in the amount of Two Thousand Dollars (\$2,000.00).

The provisions of this order shall become effective on the sixth day after service of this order on the respondents.

Copies of this decision shall be served upon the parties.

In re: L.L. PETERS and RONALD H. WHEATLEY. P&S Docket No. 6600.
Decided March 31, 1986.

William J. Weber, Administrative Law Judge.

Allan Kahan, for complainant

Jerry Deskins, for respondent.

CONSENT DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondents wilfully violated the Act and the regulations issued thereunder (9 CFR § 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondents admit the jurisdictional allegations in paragraph I of the complaint and specifically admit that the Secretary has jurisdiction in this matter, neither admit nor deny the remaining allegations, waive oral hearing and further procedure, and consent and agree, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. L. L. Peters and Ronald H. Wheatley, hereinafter referred to as the respondents, are partners doing business as The Lee Farmers Livestock Market. Respondents' business mailing address is P. O. Box 426, Jonesville, Virginia 24263.

2. Respondents are, and at all times material herein were:

(a) Engaged in the business of conducting and operating The Lee Farmers Livestock Market stockyard, a stockyard posted under and subject to the provisions of the Act, hereinafter referred to as the stockyard;

(b) Engaged in the business of buying and selling livestock in commerce on a commission basis at the stockyard; and

(c) Registered with the Secretary of Agriculture as a market agency to buy and sell livestock in commerce on a commission basis.

CONCLUSIONS

The respondents having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondents L. L. Peters and Ronald H. Wheatley, their agents and employees, directly or through any corporate or other device in connection with their business subject to the Act, shall cease and desist from engaging in business in any capacity for which bonding is required under the Packers and Stockyards Act, as amended and supplemented, and the regulations, without filing and maintaining a reasonable bond or its equivalent, as required by the Act and the regulations.

In accordance with section 312(b) of the Act (7 U.S.C. § 213(b)), respondents are jointly and severally assessed a civil penalty in the amount of Seven Hundred and Fifty Dollars (\$750.00).

The provisions of this order shall become effective on the sixth day after service of this order on the respondents.

Copies of this decision shall be served upon the parties.

In re: JAMES L. PAULSEN. P&S Docket No. 6652. Decided March 31, 1986.

Victor W. Palmer, Administrative Law Judge.

Roberta Swartzendruber, for complainant.

James P. Fitzgerald, for respondent.

CONSENT DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondent wilfully violated the Act and the regulations issued thereunder (9 CFR § 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondent admits the jurisdictional allegations in paragraph 1 of the complaint and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. James L. Paulsen, hereinafter referred to as the respondent, is an individual whose business mailing address is 13918 Arbor Street, Omaha, Nebraska 68144.

2. The respondent is, and at all times material herein was:

(a) Engaged in the business of buying and selling livestock in commerce for his own account; and

(b) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce for his own account, as a clearer through LaVern Paulsen, d/b/a Paulsen Cattle Co., Exira, Iowa.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

James L. Paulsen, his agents and employees, directly or through any corporate or other device, in connection with his business subject to the Packers and Stockyards Act, shall cease and desist from engaging in business in any capacity for which bonding is required under the Packers and Stockyards Act, as amended and supplemented, and the regulations, without filing and maintaining an adequate bond or its equivalent, as required by the Act and the regulations.

Respondent shall prepare and maintain accounts, records and memoranda which fully and correctly disclose all transactions in his business subject to the Act including (1) a purchase and sales journal; (2) complete sales invoices; and (3) complete purchase invoices and weigh sheets.

Respondent is suspended as a registrant under the Act until he complies fully with the bonding requirements under the Act and the regulations. When respondent demonstrates that he is in full compliance with such bonding requirements, a supplemental order will be issued in this proceeding terminating the suspension.

In accordance with section 312(b) of the Act (7 U.S.C. § 213(b)), respondent is hereby assessed a civil penalty in the amount of Two Thousand Dollars (\$2,000.00).

The provisions of this order shall become effective on the sixth day after service of this decision on the respondent.

Copies of this decision shall be served on the parties.

In re: B. D. GREER d/b/a CAPITAL STOCKYARD. P&S Docket
Decided April 2, 1986.

William J. Weber, Administrative Law Judge.

Ben Bruner, for complainant.

Ernest Van Hoosen, for respondent.

CONSENT DECISION

This proceeding was instituted under the Packers and Stock Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondent wilfully violated the Act and the regulations issued thereunder (9 CFR § 1.138 *et seq.*). This decision is entered pursuant to the consent decisions of the Rules of Practice applicable to this proceeding (9 CFR § 1.138).

The respondent admits the jurisdictional allegations in paragraph I of the complaint and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further proceedings and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. B. D. Greer, hereinafter referred to as the respondent, is an individual doing business as Capital Stockyard with his principal place of business located at Montgomery, Alabama. Respondent's business mailing address is Capital Stockyard, P. O. Box 404, Montgomery, Alabama 36101.

2. The respondent is, and at all times material herein was:

(a) Engaged in the business of conducting and operating the Capital Stockyard, a stockyard posted under and subject to the provisions of the Act, hereinafter referred to as the stockyard;

(b) Engaged in the business of buying and selling livestock on a commission basis at the stockyard; and

(c) Engaged in the business of buying and selling livestock for his own account in commerce.

3. The respondent is, and at all times material herein was, registered with the Secretary of Agriculture as a market agency to buy and sell livestock on a commission basis in commerce, and as a dealer to buy and sell livestock in commerce.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent B. D. Greer, his agents and employees, directly or through any corporate or other device, shall cease and desist from:

1. Failing to deposit to his Custodial Account for Shippers' Proceeds, within the times prescribed by section 201.42 of the regulations (9 CFR § 201.42), amounts equal to the proceeds due consignors from the sale of their livestock;

2. Using funds received as proceeds from the sale of consigned livestock for purposes of his own or for any purpose other than the payment of net proceeds to the owners, consignors or shippers of livestock or the payment of amounts due the respondent for lawful marketing charges; and

3. Failing to otherwise maintain his Custodial Account for Shippers' Proceeds in strict conformity with the requirements of section 201.42 of the regulations (9 CFR § 201.42).

Respondent is suspended as a registrant under the Packers and Stockyards Act for a period of seven (7) days and thereafter until he demonstrates that the deficiency in his Custodial Account for Shippers' Proceeds has been eliminated. When respondent demonstrates that the deficiency in his Custodial Account for Shippers' Proceeds has been eliminated, a supplemental order will be issued in this proceeding terminating the suspension after the expiration of the seven (7) day period.

In accordance with section 312(b) of the Act (7 U.S.C. § 213(b)), respondent is assessed a civil penalty in the amount of Ten Thousand Dollars (\$10,000.00).

The provisions of this order shall become effective on the sixth day after service of this decision on the respondent.

Copies of this decision shall be served on the parties.

In re: CARTER-KIRCHHOFF FEED YARD, INC., and BOB CARTER. P&S
Docket No. 6611. Decided April 2, 1986.

Edward H. McGrath, Administrative Law Judge.

Dennis Becker, for complainant.

R. Byrn Bass, Jr., for respondent.

CONSENT DECISION WITH RESPECT TO CARTER-KIRCHHOFF FEED YARD
AND BOB CARTER

This proceeding was instituted under the Packers and Stockyard Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondents violated the Act. This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondents admit the jurisdictional allegations in paragraph I of the complaint and specifically admit that the Secretary has jurisdiction in this matter, neither admit nor deny the remaining allegations, waive oral hearing and further procedure, and consent and agree, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Carter-Kirchhoff Feed Yard, Inc., hereinafter referred to as the corporate respondent, is a Texas corporation with its principal place of business at Plainview, Texas. Its business mailing address is 1503 West 5th Street, Plainview, Texas 79072.

2. At all times material herein corporate respondent was:

(a) Engaged in the business of conducting and operating a custom feed lot;

(b) Engaged in the business of a dealer buying and selling in commerce livestock either for its own account or as the agent of the vendor or purchaser; and

(c) Not registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce.

3. Bob Carter, hereinafter referred to as the individual respondent, is an individual whose business mailing address is 1503 West 5th Street, Plainview, Texas 79072.

4. At all times material herein individual respondent was:

(a) Owner of 32 of 422 outstanding shares and operator of corporate respondent;

(b) Responsible for the direction, management and control of the corporate respondent; and

(c) A dealer within the meaning of those terms as defined in the Act and subject to the provisions of the Act.

CONCLUSIONS

The respondents having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondents, directly or through any corporate or other device, in connection with their business as a dealer or market agency subject to the Packers and Stockyards Act, shall cease and desist from:

1. Issuing checks which remit the net proceeds due owners of livestock sold by respondents without having and maintaining sufficient funds to pay such checks upon presentment;

2. Failing to remit to the owners of livestock sold by respondents the net proceeds due such owners;

3. Using proceeds due to the owners of livestock for purposes of their own or for any purpose other than the prompt remittance of such proceeds to the owners; and

4. Selling livestock on behalf of their feedlot customers without the prior consent of such customers.

The corporate respondent shall post a bond for the protection of users of its services. The amount of the bond shall be determined by dividing the total dollar value of livestock sold during the preceding business year for the accounts of others by 130. The amount so determined shall be increased to the next multiple of \$5,000. The bond shall contain the following clauses:

- (1) If the said principal shall pay when due to the person or persons entitled thereto the purchase price of all livestock purchased by said principal for the account of others, and if the said principal shall safely keep and properly disburse all funds, if any, which come into his hands for the purpose of paying for livestock purchased for the accounts of others; and

- (2) If the said principal shall pay when due to the person or persons entitled thereto the gross amount, less lawful charges, for which all livestock is sold for the accounts of others by said principal.

Then this bond shall be null and void, otherwise to remain in full force and effect.

The Administrator of the Packers and Stockyards Administration may attach such other terms, conditions and limitations as are appropriate for bonds required of dealers and packers under the Packers and Stockyards Act, 1921, as amended.

The corporate respondent shall establish and maintain a custodial account which conforms to the requirements set forth in section 201.42 of the regulations (9 CFR § 201.42)) pertaining to custodial accounts to be maintained by market agencies selling on commission.

In accordance with section 312(b) of the Act, the corporate respondent and individual respondent are assessed jointly and severally a civil penalty of one hundred thousand dollars (\$100,000) with the proviso that the civil penalties will be waived if full restitution is made to the parties named in paragraph II(a) of the complaint within 90 days of the entry of this order.

The provisions of this order shall become effective on the sixth day after service of this order on the respondents.

Copies of this decision shall be served upon the parties.

In re: JOHNNY MERRIWETHER. P&S Docket No. 6648. Decided April 4, 1986.

William J. Weber, Administrative Law Judge.

Peter Train, for complainant

For respondent, Kpro se.

CONSENT DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondent wilfully violated the Act and the regulations issued thereunder (9 CFR § 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondent admits the jurisdictional allegations in paragraph I of the complaint and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Johnny Meriwether, hereinafter referred to as the respondent, is an individual whose mailing address is Route 2, Box 100 JM, Rusk, Texas 75785.

2. Respondent is, and at all times material herein was:

(a) Engaged in the business of a market agency buying livestock in commerce on a commission basis; and

(b) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce for his own account, and as a market agency to buy livestock in commerce on a commission basis. This registration has been inactive since July 15, 1983.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent Merriwether, his agents and employees, directly or through any corporate or other device, shall cease and desist from engaging in business in any capacity for which bonding is required under the Packers and Stockyards Act, as amended and supplemented, and the regulations, without filing and maintaining a reasonable bond or its equivalent, as required by the Act and the regulations.

Respondent is suspended as a registrant under the Act until such time as he complies fully with the bonding requirements under the Act and the regulations. When respondent demonstrates that he is in full compliance with such bonding requirements, a supplemental order will be issued in this proceeding terminating this suspension.

In accordance with section 312(b) of the Act (7 U.S.C. § 213(b)), respondent is assessed a civil penalty in the amount of Three Hundred Dollars (\$300.00).

The provisions of this order shall become effective on the sixth day after service of this order on the respondent.

Copies of this decision shall be served upon the parties.

In re: TOP-LINE PACKING CO. INC., VERN SLAGH and WADE SLAGH
P&S Docket No. 6554. Decided February 20, 1986.

William J. Weber, Administrative Law Judge
Ben Bruner, for complainant
Pro se, for respondent.

DECISION AND ORDER WITH RESPECT TO VERN SLAGH AND WADE SLAGH UPON ADMISSION OF FACTS BY REASON OF DEFAULT

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *seq.*), herein referred to as the Act, instituted by a Complaint and Notice of Hearing filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, charging that the respondents wilfully violated the Act.

Copies of the Complaint and Notice of Hearing and Rules of Practice (7 CFR § 1.130 *et seq.*) governing proceedings under the Act were served on the respondents by certified mail. Respondents were informed in a letter of service that an answer should be filed pursuant to the Rules of Practice and that failure to answer would constitute an admission of all the material allegations contained in the Complaint and Notice of Hearing.

Respondents Vern Slagh and Wade Slagh have failed to file an answer within the time prescribed in the Rules of Practice, and the material facts alleged in the Complaint and Notice of Hearing as they pertain to respondents Vern Slagh and Wade Slagh, which are admitted by respondents' failure to file an answer, are adopted and set forth herein as findings of fact.

This decision and order, therefore, is issued pursuant to section 1.139 of the Rules of Practice (7 CFR § 1.139).

FINDINGS OF FACT

1. (a) Top-Line Packing Co., Inc., hereinafter referred to as the corporate respondent, is a corporation whose business mailing address is 3061 Shaffer Road, S.E., Grand Rapids, Michigan 49508.

(b) The corporate respondent at all times material herein was

(1) Engaged in the business of buying livestock in commerce for purposes of slaughter, and of manufacturing or preparing meat and meat food products for sale or shipment in commerce; and

(2) A packer within the meaning of and subject to the provisions of the Act.

(c) Vern Slagh and Wade Slagh, hereinafter referred to as the individual respondents, are individuals whose business mailing address is 3061 Shaffer Road, S.E., Grand Rapids, Michigan 49508.

(d) The individual respondents at all times material herein were:

(1) President and Vice-President, respectively, of the corporate respondent;

(2) Owners of 100% of the outstanding stock of the corporate respondent; and

(3) Jointly responsible for the direction, control and management of the corporate respondent.

(e) The individual respondents at all times material herein were packers within the meaning of and subject to the provisions of the Act.

2. The corporate respondent, under the direction, control and management of the individual respondents, in connection with its operations subject to the Act, on or about the dates and in the transactions set forth in paragraph II of the Complaint and Notice of Hearing, issued checks in purported payment for the purchase of livestock, which checks were returned unpaid by the bank upon which they were drawn because respondents did not have sufficient funds on deposit and available in the account upon which such checks were drawn to pay the checks when presented.

3. The corporate respondent, under the direction, management and control of the individual respondents, in connection with its operations subject to the Act, on or about the dates and in the transactions set forth in paragraph II of the Complaint and Notice of Hearing and also on or about the dates and in the transactions set forth in Paragraph III of the Complaint and Notice of Hearing, purchased livestock and failed to pay, when due, the full purchase price of such livestock.

CONCLUSIONS

By reason of the facts found in Finding of Fact 2 herein, respondents have wilfully violated section 202(a) of the Act (7 U.S.C. § 192(a)).

By reason of the facts found in Finding of Fact 3 herein, respondents have wilfully violated sections 202(a) and 409(a) of the Act (7 U.S.C. §§ 192(a), 228b(a)).

ORDER

Respondents Vern and Wade Slagh, individually or as officers, agents or employees of respondent Top-Line Packing Co., Inc., directly or through any corporate or other device, in connection with their operations subject to the Packers and Stockyards Act, shall cease and desist from:

1. Issuing checks in payment for livestock without having and maintaining sufficient funds on deposit and available in the bank account upon which they are drawn to pay the checks when presented; and

2. Failing to pay, when due, for livestock purchases.

In accordance with section 203(b) of the Act (7 U.S.C. # 193b), the individual respondents are jointly and severally assessed a civil penalty in the amount of Five Thousand Dollars (\$5,000.00).

This decision and order shall become final without further proceedings 35 days after service hereof unless appealed to the Judicial Officer within 30 days after service (7 CFR # 1.139, 1.145).

Copies hereof shall be served on the parties.

[The Decision and Order became final on April 7, 1986.—Ed.]

In re: SCHEPMANN CATTLE Co. P&S Docket No. 6580. Decided February 24, 1986.

John A. Campbell, Administrative Law Judge.

Roberta Swartzendruber, for complainant.

For respondent, pro se.

DECISION AND ORDER UPON ADMISSION OF FACT BY REASON OF DEFAULT

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq.*), herein referred to as the Act, instituted by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, charging that the respondent wilfully violated the Act and the regulations promulgated thereunder (9 CFR § 201.1 *et seq.*).

Copies of the complaint and Rules of Practice (7 CFR § 1.130 *et seq.*) governing proceedings under the Act were served on the respondent. Respondent was informed in a letter of service that an answer should be filed pursuant to the Rules of Practice and that failure to answer would constitute an admission of all the material allegations contained in the complaint.

Respondent has failed to file an answer within the time prescribed in the Rules of Practice, and the material facts alleged in the complaint, which are admitted by respondent's failure to file an answer, are adopted and set forth herein as findings of fact.

This decision and order, therefore, is issued pursuant to section 1.139 of the Rules of Practice (7 CFR § 1.139).

FINDINGS OF FACT

1. (a) Schepmann Cattle Co., hereinafter referred to as the respondent, is a corporation organized and existing under the laws of the State of Kansas, whose principal place of business is located in Claflin, Kansas. Respondent's business mailing address is 217 B Street, Box 363, Claflin, Kansas 67525.

(b) The respondent is, and at all times material herein was:

(1) Engaged in the business of buying and selling livestock in commerce for its own account, and buying livestock in commerce on a commission basis; and

(2) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce for its own account and a market agency to buy livestock in commerce on a commission basis.

2. Respondent was notified by certified mail on May 15, 1985, that \$65,000.00 surety bond it maintained to secure the performance of its livestock obligations under the Act was being terminated on June 12, 1985. Respondent was further notified that if it continued its livestock operations under the Act without providing adequate bond coverage or its equivalent, it would be in violation of section 312(a) of the Act (7 U.S.C. § 213(a)), and sections 201.29 and 201.30 of the regulations. Notwithstanding such notice, respondent has continued to engage in the business of a dealer buying and selling livestock in commerce for its own account and the business of a market agency buying livestock in commerce on a commission basis without maintaining an adequate bond or its equivalent as required by the Act and the regulations.

CONCLUSIONS

By reason of the facts found in Finding of Fact 2 herein, respondent has wilfully violated section 312(a) of the Act (7 U.S.C. § 213(a)), and sections 201.29 and 201.30 of the regulations (9 CFR §§ 201.29, 201.30).

ORDER

Respondent Schepmann Cattle Co., its officers, directors, agents and employees, shall cease and desist from engaging in business in any capacity for which bonding is required under the Packers and Stockyards Act, as amended and supplemented, and the regulations, without filing and maintaining an adequate bond or its equivalent, as required by the Act and the regulations.

Respondent is suspended as a registrant under the Act until it complies fully with the bonding requirements under the Act and the regulations. When respondent demonstrates that it is in full

compliance with such bonding requirements, a supplemental order will be issued in this proceeding terminating the suspension.

In accordance with section 312(b) of the Act (7 U.S.C. § 213b), respondent is hereby assessed a civil penalty in the amount of Ten Thousand Dollars (\$3,000.00).

This decision and order shall become final without further proceedings 35 days after service hereof unless appealed to the Judicial Officer within 30 days after service (7 CFR §§ 1.139, 1.145).

Copies hereof shall be served on the parties.

[The Decision and Order became final on April 7, 1986. -EJ]

In re: ENSHALLAH CATTLE COMPANY, INC., A.A. "BUD" CERVANTES, III, and DWIGHT JEFcoat. P&S Docket No. 6622. Decided April 8, 1986.

John A. Campbell, Administrative Law Judge.

Dennis Becker, for complainant.

For respondent, *pro se*.

CONSENT DECISION WITH RESPECT TO ENSHALLAH CATTLE COMPANY, INC., AND A.A. "BUD" CERVANTES, III

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondents violated the Act and the regulations issued thereunder (9 CFR § 201.1 *et seq.*). The decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.13).

Respondents Enshallah Cattle Company, Inc., and A.A. "Bud" Cervantes, III, admit the jurisdictional allegations in paragraph 1 of the complaint and specifically admit that the Secretary has jurisdiction in this matter, neither admit nor deny the remaining allegations, waive oral hearing and further procedure, and consent and agree, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1 Enshallah Cattle Company, Inc., hereinafter referred to as the corporate respondent, is a corporation incorporated under the law of the State of Mississippi, with its principal place of business in Poplarville, Mississippi. The business mailing address of the corporation is P.O. Box 209, Poplarville, Mississippi 39470.

2. Corporate respondent is, and at all times material herein was engaged in the business of buying and selling livestock in commerce for its own account.

3. A.A. "Bud" Cervantes III, is an individual whose business address is Route 2, Carriere, Mississippi 39426.

4. A.A. "Bud" Cervantes is, and at all times material herein was:

(a) Engaged in the business of buying and selling livestock for his own account;

(b) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce for his own account;

(c) President/Director of the corporation; and

(d) Jointly responsible for the direction, management and control of the corporate respondent with Dwight Jefcoat.

CONCLUSIONS

Respondent Enshallah Cattle Company, Inc., and respondent A.A. "Bud" Cervantes, III, having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent Enshallah Cattle Company, Inc., its successors, officers, directors, agents and employees, directly and through any corporate or other device, and respondent A.A. "Bud" Cervantes III, his agents or employees, directly or through any corporate or other device, shall cease and desist from:

1. Issuing checks in payment for livestock without having and maintaining sufficient funds to pay such checks upon presentment;

2. Failing to pay, when due, for livestock purchases;

3. Failing to pay for livestock purchases; and

4. Engaging in business in any capacity for which bonding is required under the Act without having and maintaining an adequate bond or bond equivalent.

Respondent Enshallah Cattle Company, Inc. and respondent A.A. "Bud" Cervantes, III, shall keep and maintain accounts, records and memoranda which fully and correctly disclose the true nature of all transactions involved in any business in which they are subject to the Packers and Stockyards Act, including purchases invoices, accounts of sale, scale tickets, contracts, agreements, livestock advances, health records, freight bills, feed bills, load makeup records, worksheets, records of accounts payable, inventory records, a general ledger, a cash receipts journal, and a cash disbursements journal.

The corporate respondent is prohibited from operating subject to the Act for a period of six months and thereafter until such time as it complies fully with the registration and bonding requirements under the Act and the regulations. When the corporate respondent demonstrates that it is in full compliance with such registration and bonding requirements, a supplemental order will be issued in this proceeding terminating this prohibition.

Respondent A.A. "Bud" Cervantes is suspended as a registrar for a period of six months and thereafter until he complies fully with the bonding requirements under the Act and the regulations. When respondent Cervantes demonstrates that he is in full compliance with such registration and bonding requirements, a supplemental order will be issued in this proceeding terminating this suspension.

The provisions of this order shall become effective on the sixth day after service of this order on the respondents.

Copies of this decision shall be served upon the parties.

In re: KENNETH DEE SORRELS. P&S Docket No. 6590. Decided February 24, 1986.

Dorothea A. Baker, Administrative Law Judge.

Ken Vail, for complainant.

For respondent, pro se.

DECISION AND ORDER UPON ADMISSION OF FACTS BY REASON OF DEFAULT

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq.*), herein referred to as the Act, instituted by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, charging that the respondent wilfully violated the Act and the regulations issued thereunder (9 CFR § 201.1 *et seq.*).

Copies of the complaint and Rules of Practice (7 CFR § 1.130 *et seq.*) governing proceedings under the Act were served on the respondent. Respondent was informed in a letter of service that an answer should be filed pursuant to the Rules of Practice and that failure to answer would constitute an admission of all the material allegations contained in the complaint.

Respondent has failed to file an answer within the time prescribed in the Rules of Practice, and the material facts alleged in

the complaint, which are admitted by respondent's failure to file an answer, are adopted and set forth herein as findings of fact.

This decision and order, therefore, is issued pursuant to section 1.139 of the Rules of Practice (7 CFR § 1.139).

FINDINGS OF FACT

1. (a) Kenneth Dee Sorrels, hereinafter referred to as the respondent, is an individual whose business mailing address is P. O. Box 131, Atkins, Arkansas 72823.

(b) Respondent is, and at all times material herein was:

(1) Engaged in the business of a market agency buying livestock in commerce on a commission basis; and

(2) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce for his own account and as a market agency to buy livestock in commerce on a commission basis.

2. The Packers and Stockyards Administration notified respondent on June 5, 1985, that the \$10,000.00 trust fund agreement he maintained to secure the performance of his livestock obligations under the Act was inadequate and that it was necessary to increase such trust fund agreement to \$20,000.00. Respondent failed to increase his trust fund agreement. Respondent was notified on July 1, 1985, that his trust fund agreement would terminate on August 1, 1985, and that if he continued his livestock operations without adequate bond coverage or its equivalent, he would be in violation of section 312(a) of the Act and sections 201.29 and 201.30 of the regulations. Notwithstanding such notice, respondent has continued to engage in the business of a market agency buying livestock in commerce on a commission basis, without maintaining bond coverage or its equivalent, as required by the Act and the regulations.

CONCLUSIONS

By reason of the facts found in Finding of Fact 2 herein, respondent has wilfully violated section 312(a) of the Act (7 U.S.C. § 213(a)), and sections 201.29 and 201.30 of the regulations (9 CFR §§ 201.29, 201.30).

ORDER

Respondent Kenneth Dee Sorrels, his agents and employees, directly or through any corporate or other device, shall cease and desist from engaging in business in any capacity for which bonding is required under the Packers and Stockyards Act, without filing and maintaining a reasonable bond or its equivalent, as required by the Act and the regulations.

Respondent is suspended as a registrant under the Act until such time as he complies fully with the bonding requirements under the Act and the regulations. When respondent demonstrates that he is in full compliance with such bonding requirements, a supplemental order will be issued in this proceeding terminating this suspension.

In accordance with section 312(b) of the Act (7 U.S.C. § 213(b)), respondent is assessed a civil penalty in the amount of One Thousand Dollars (\$1,000.00).

This decision and order shall become final without further proceedings 35 days after service hereof unless appealed to the Judicial Officer within 30 days after service (7 CFR §§ 1.139, 1.145).

Copies hereof shall be served on the parties.

[The Decision and Order became final on April 10, 1986.—Ed.]

In re: RALPH B. SHAW. P&S Docket No. 6627. Decided February 25, 1986.

John A. Campbell, Administration Law Judge

Robert Swartzendruber, for complainant.

or respondent, *pro se*.

DECISION AND ORDER UPON ADMISSION OF FACTS BY REASON OF DEFAULT

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq.*), herein referred to as the Act, instituted by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, charging that the respondent wilfully violated the Act and the regulations promulgated thereunder (9 CFR § 201.1 *et seq.*).

Copies of the complaint and Rules of Practice (7 CFR § 1.130 *et seq.*) governing proceedings under the Act were served on the respondent. Respondent was informed in a letter of service that an answer should be filed pursuant to the Rules of Practice and that failure to answer would constitute an admission of all the material allegations contained in the complaint.

Respondent has failed to file an answer within the time prescribed in the Rules of Practice, and the material facts alleged in the complaint, which are admitted by respondent's failure to file an answer, are adopted and set forth herein as findings of fact.

This decision and order, therefore, is issued pursuant to section 39 of the Rules of Practice (7 CFR § 1.139).

FINDINGS OF FACT

1. (a) Ralph B. Shaw, hereinafter referred to as the respondent, is an individual whose business mailing address is Route #5, Box 294, Athens, Alabama 35611.

(b) The respondent is, and at all times material herein was:

(1) Engaged in the business of buying and selling livestock in commerce for his own account and buying livestock in commerce on a commission basis; and

(2) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce for his own account and as a market agency to buy livestock in commerce on a commission basis.

2. Respondent was notified by certified mail on July 9, 1985, that the \$35,000.00 surety bond he maintained to secure the performance of his livestock obligations under the Act was being terminated on July 31, 1985. Respondent was further notified that if he continued his livestock operations under the Act without providing adequate bond coverage or its equivalent, he would be in violation of section 312(a) of the Act (7 U.S.C. § 213(a)), and sections 201.29 and 201.30 of the regulations. Notwithstanding such notice, respondent has continued to engage in the business of a dealer buying and selling livestock in commerce for his own account and the business of a market agency buying livestock in commerce on a commission basis without maintaining an adequate bond or its equivalent as required by the Act and the regulations.

CONCLUSIONS

By reason of the facts found in Finding of Fact 2 herein, respondent has wilfully violated section 312(a) of the Act (7 U.S.C. § 213(a)), and sections 201.29 and 201.30 of the regulations (9 CFR §§ 201.29, 201.30).

ORDER

Ralph B. Shaw, his agents and employees, directly or through any corporate or other device, in connection with his business subject to the Packers and Stockyards Act, shall cease and desist from engaging in business in any capacity for which bonding is required under the Packers and Stockyards Act, as amended and supplemented, and the regulations, without filing and maintaining an adequate bond or its equivalent, as required by the Act and the regulations.

Insofar as respondent is now in full compliance with the bonding requirements under the Act and the regulations, no suspension is warranted.

In accordance with section 312(b) of the Act (7 U.S.C. § 213(b)), respondent is hereby assessed a civil penalty in the amount of One Thousand Eight Hundred Dollars (\$1,800.00).

This decision and order shall become final without further proceedings 35 days after service hereof unless appealed to the Judicial Officer within 30 days after service (7 CFR §§ 1.139, 1.145).

Copies hereof shall be served on the parties.

[The Decision and Order became final on April 10, 1986.—Ed.]

In re: ROBERT MCCORNACK and RANDY CROOK. P&S Docket No. 6683. Decided April 10, 1986.

John A. Campbell, Administrative Law Judge.

Jory M. Hochberg, for complainant

For respondent, pro se.

CONSENT DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondents wilfully violated the Act and the regulations issued thereunder (9 CFR § 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondents admit the jurisdictional allegations in paragraph I of the complaint and specifically admit that the Secretary has jurisdiction in this matter, neither admit nor deny the remaining allegations, waive oral hearing and further procedure, and consent and agree, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1 (a) Robert McCornack, hereinafter referred to as respondent McCornack, is an individual whose business mailing address is Box 410, Ringling, Oklahoma 73456.

(b) Randy Crook, hereinafter referred to as respondent Crook, is an individual whose business mailing address is Box 410, Ringling, Oklahoma 73456.

(c) Respondents McCornack and Crook, at all times material herein, were doing business as Ringling Livestock Auction, a partnership or joint venture, and in that capacity were:

(1) Engaged in the business of conducting and operating the Ringling Livestock Auction stockyard, a posted stockyard subject to the Act, hereinafter referred to as the stockyard;

(2) Engaged in the business of selling livestock on a commission basis at the stockyard; and

(3) Registered with the Secretary of Agriculture as market agencies to sell livestock in commerce on a commission basis.

CONCLUSIONS

The respondents having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondents McCornack and Crook, their agents and employees, successors and assigns, directly or through any corporate or other device, shall cease and desist from:

1. Failing to deposit in the Custodial Account for Shippers' Proceeds, within the time prescribed in section 201.42 of the regulations (9 CFR § 201.42), amounts equal to the outstanding proceeds receivable due from the sale of consigned livestock;

2. Using funds received as proceeds from the sale of consigned livestock for purposes of their own or for any purpose other than for the payment of the net proceeds to the owners or consignors of such livestock, or for the payment of sums due the respondents as compensation for services rendered or for other lawful marketing charges;

3. Making such use or disposition of funds in their possession or control as will endanger or impair the faithful and prompt accounting therefor and the payment of the portions thereof which may be due the owners or consignors of livestock;

4. Failing to otherwise maintain the Custodial Account for Shippers' Proceeds in strict conformity with the provisions of section 201.42 of the regulations (9 CFR § 201.42);

5. Issuing checks to owners or consignors of livestock in payment of the net proceeds due from the sale of their livestock without having sufficient funds on deposit and available in the account upon which they are drawn to pay such checks when presented; and

6. Failing to remit to the owners or consignors of livestock, when due, the net proceeds derived from the sale of their livestock.

Respondents McCornack and Crook are suspended as registrants under the Act for a period of twenty eight days and thereafter until they demonstrate that the deficit in the custodial account has

been eliminated. When respondents demonstrate that the deficit in the custodial account has been eliminated, a supplemental order will be issued in this proceeding terminating this suspension after the expiration of the twenty eight day period of suspension. Respondents acknowledge and agree that during the initial twenty eight day period of their suspension, they are prohibited from acting as employees or agents of any dealer or market agency subject to the Act, or from acting as a packer-buyer subject to the Act.

The provisions of this order shall become effective on the day it is filed.

Copies of this decision shall be served upon the parties.

*In re: YUMA MEAT CO. INC., RICHARD LISKA and FRED LUECK. P&S
Docket No. 6636. Decided April 11, 1986.*

Edward H. McGrail, Administration Law Judge.

Roberta Swartzendruber, for complainant.

Pro se, for respondent.

CONSENT DECISION WITH RESPECT TO RICHARD LISKA

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a Complaint and Notice of Hearing filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondents violated the Act. This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

Respondent Richard Liska admits the jurisdictional allegations in paragraph II of the Complaint and Notice of Hearing and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Richard Liska, hereinafter referred to as respondent Liska, is an individual whose business mailing address is 4647 Gloria, Prescott, Arizona 86301.

2. Respondent Liska, at all times material herein, was:

(a) President and Manager of the corporate respondent;

(b) Owner of 50% of the outstanding stock of the corporate respondent;

(c) Responsible for the direction, management and control of the corporate respondent; and

(d) A packer within the meaning of and subject to the provisions of the Act.

CONCLUSIONS

Respondent Liska having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent Liska, directly or through any corporate or other device, in connection with his operations subject to the Packers and Stockyards Act, shall cease and desist from:

1. Issuing checks in payment for livestock purchases without having sufficient funds available in the bank account upon which such checks are drawn to pay such checks when presented; and

2. Failing to pay, when due, the full purchase price of livestock.

In accordance with section 203(b) of the Act (7 U.S.C. § 193(b)), respondent Liska is assessed a civil penalty of One Thousand Dollars (\$1,000.00).

Such order shall have the same force and effect as if entered after full hearing and shall be effective on the first day after service upon the respondent.

Copies of this decision shall be served upon the parties.

In re: KATHY JONES. P&S Docket No. 6671. Decided April 11, 1986.

William J. Weber, Administrative Law Judge.

Eric Paul, for complainant.

For respondent, pro se.

CONSENT DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondent wilfully violated the Act and the regulations issued thereunder (9 CFR § 201.1 *et seq.*). This decision is entered pursuant to the consent decision pro-

visions of the Rules of Practice applicable to this proceeding (7 CF. § 1.138).

The respondent admits the jurisdictional allegations in paragraph I of the complaint and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Kathy Jones, hereinafter referred to as the respondent, is an individual doing business as K Cattle Company. Respondent's principal place of business is located in Camilla, Georgia, and her business mailing address is Route 1, Bainbridge Highway, Camilla, Georgia 31730.

2. The respondent, at all times material herein, was:

(a) Engaged in the business of a dealer, buying and selling livestock in commerce for her own account; and

(b) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce for her own account.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent Kathy Jones, her agents and employees, directly or through any corporate or other device, in connection with her activities subject to the Packers and Stockyards Act, shall cease and desist from:

1. Issuing checks in payment for livestock purchased without having and maintaining sufficient funds on deposit and available in the account upon which such checks are drawn to pay such checks when presented;

2. Failing to pay, when due, for livestock purchased; and

3. Failing to pay for livestock.

The respondent is suspended as a registrant under the Act for a period of five years, provided, however, that upon application to the Packers and Stockyards Administration a supplemental order may be issued terminating this suspension at any time after the expiration of 30 days upon demonstration by respondent that all unpaid livestock sellers have been paid in full, and provided fur-

ther that the suspension of respondent shall not constitute a bar on her employment by any other registrant under the Act after the completion of the first 30 days of the suspension.

The provisions of this order shall become effective on the sixth day after service of this order on the respondent.

Copies of this decision shall be served upon the parties.

In re: H.J. KEITH, JR., and PEARSALL LIVESTOCK MARKET, INC. P&S
Docket No. 6491. Decided April 14, 1986.

William J. Weber, Administrative Law Judge.

Peter Train, for complainant.

For respondent, *pro se*.

CONSENT DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondent wilfully violated the Act and the regulations issued thereunder (9 CFR § 201.1 *et seq.*). The complaint was subsequently amended to add an additional party. This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondents admit the jurisdictional allegations in paragraph I of the amended complaint and specifically admit that the Secretary has jurisdiction in this matter, neither admit nor deny the remaining allegations, waive oral hearing and further procedure, and consent and agree, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. H. J. Keith, Jr., hereinafter referred to as the individual respondent, is an individual whose address is P. O. Box 1049, Pearsall, Texas 78061.

2. The individual respondent is, and at all times material herein was:

(a) Engaged in the business of conducting and operating the Pearsall Livestock Market stockyard, a posted stockyard under the Act, hereinafter referred to as the stockyard;

(b) Engaged in the business of selling livestock on a commission basis at the stockyard, and buying and selling livestock in commerce for his own account; and

(c) Registered with the Secretary of Agriculture as a marketing agency to buy and sell livestock on a commission basis in commerce.

3. Pearsall Livestock Market, Inc., hereinafter referred to as the corporate respondent, is a corporation incorporated under the laws of the State of Texas, with its principal place of business in Pearsall, Texas. The corporate respondent's business mailing address is P.O. Box 1049, Pearsall, Texas 78091.

4. The corporate respondent is:

(a) Engaged in the business of conducting and operating the Pearsall Livestock Market stockyard, a posted stockyard, under the Act, hereinafter referred to as the stockyard;

(b) Engaged in the business of selling livestock on a commission basis at the stockyard, and buying and selling livestock in commerce for his own account; and

(c) Registered with the Secretary of Agriculture as a marketing agency to buy and sell livestock on a commission basis in commerce.

CONCLUSIONS

Respondents having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent H. J. Keith, Jr. and Pearsall Livestock Market, Inc. and their agents and employees, directly or through any corporate or other device, in connection with their operations subject to the Packers and Stockyards Act, shall cease and desist from:

1. Failing to deposit in their "Custodial Account for Shipper Proceeds," within the time prescribed by section 201.42(c) of the regulations (9 CFR § 201.42(c)), an amount equal to the proceeds receivable from the sale of consigned livestock;

2. Failing to otherwise maintain their "Custodial Account for Shippers' Proceeds" in strict conformity with the provisions of section 201.42 of the regulations (9 CFR § 201.42);

3. Using funds received as proceeds from the sale of livestock sold on a commission basis for purposes of their own or for purposes other than the payment of net proceeds to the owners, consignors or shippers of such livestock and the payments of amounts due respondents for lawful marketing charges;

4. Issuing checks in payment for livestock purchases without having and maintaining sufficient funds on deposit and available in the accounts upon which such checks were drawn to pay such checks when presented;

5. Issuing drafts in payment for livestock without having or maintaining sufficient funds on deposit and available to pay such drafts when presented;

6. Failing to honor drafts, drawn and issued in payment for livestock, when presented for payment;

7. Failing to pay, when due, the full purchase price for livestock;

8. Failing to pay the full purchase price for livestock; and

9. Issuing drafts which are not checks in payment for livestock without obtaining, prior to the transaction, the express written consent of the sellers that payment may be made by such draft.

Respondents are suspended as registrants under the Act for a period of three (3) months, and thereafter until such time as they demonstrate that the shortage in their custodial account for shippers' proceeds has been eliminated. When respondents demonstrate that the shortage in their custodial account has been eliminated, a supplemental order will be issued in this proceeding terminating the suspension after the expiration of the three month period.

The provisions of this order shall become effective on the sixth day after service of this order on the respondents.

Copies of this decision shall be served upon the parties.

In re: STEVE A. MICKELSON. P&S Docket No. 6566. Decided February 24, 1986.

Edward H. McGrail, Administrative Law Judge.

Kenneth Vail, for complainant.

For respondent, *pro se*.

DECISION AND ORDER UPON ADMISSION OF FACTS BY REASON OF DEFAULT

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq.*), herein referred to as the Act, instituted by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, charging that the respondent wilfully violated the Act.

Copies of the complaint and Rules of Practice (7 CFR § 1.130 *et seq.*) governing proceedings under the Act were served on the re-

spondent. Respondent was informed in a letter of service that an answer should be filed pursuant to the Rules of Practice and that failure to answer would constitute an admission of all the material allegations contained in the complaint.

Respondent has failed to file an answer within the time prescribed in the Rules of Practice, and the material facts alleged in the complaint, which are admitted by respondent's failure to file an answer, are adopted and set forth herein as findings of fact.

This decision and order, therefore, is issued pursuant to section 1.139 of the Rules of Practice (7 CFR § 1.139).

FINDINGS OF FACT

1. (a) Steve M. Mickelson, hereinafter referred to as the respondent, is an individual whose business mailing address is Route 2 Box 284A, Minong, Wisconsin 54849.

(b) The respondent is, and at all times material herein was:

(1) Engaged in the business of buying and selling livestock in commerce for his own account and the accounts of others; and

(2) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce for his own account.

2. (a) As of March 28, 1985, the respondent's current liabilities exceeded his current assets. As of that date, the respondent had current liabilities in the amount of \$124,962.51 and current assets in the amount of \$300.00, resulting in an excess of current liabilities over current assets of \$124,662.51.

(b) The respondent's current liabilities presently exceed his current assets.

3. The respondent, in connection with his operations subject to the Act, on or about the dates and in the transactions set forth in paragraph III of the complaint, purchased livestock and in purported payment for such livestock, issued checks which were returned unpaid by the bank on which they were drawn. Certain of the checks were returned because respondent did not have sufficient funds on deposit and available in the account on which they were drawn to pay such checks when presented and others because the account had been closed.

4. (a) Respondent, in connection with his operations subject to the Act, on or about the dates and in the transactions set forth in paragraph III of the complaint, purchased livestock and failed to pay, when due, the full purchase price of such livestock.

(b) As of April 17, 1985, there remained unpaid a total \$114,277.78 for such livestock purchases.

CONCLUSIONS

By reason of the facts found in Finding of Fact 2 herein, the financial condition of the respondent does not meet the requirements of the Act (7 U.S.C. § 204).

By reason of the facts alleged in Findings of Fact 3 and 4 herein, the respondent has wilfully violated sections 312(a) and 409 of the Act (7 U.S.C. §§ 213(a), 228b).

ORDER

Respondent Steve M. Mickelson, his agents and employees, directly or through any corporate or other device, in connection with his operations subject to the Packers and Stockyards Act, shall cease and desist from:

1. Issuing checks in payment for livestock purchases without having and maintaining sufficient funds on deposit and available in the accounts upon which such checks are drawn to pay such checks when presented;

2. Failing to pay, when due, the full purchase price of livestock; and

3. Failing to pay the full purchase price of livestock.

Respondent is suspended as a registrant under the Act for a period of six (6) months, and thereafter until such time as he demonstrates that his financial condition meets the requirements of the Act, that is, that his current assets exceed his current liabilities. When the respondent demonstrates that his current assets exceed his current liabilities, a supplemental order will be issued in accordance with the terms of this decision, terminating the suspension after the expiration of the six (6) month period.

This decision and order shall become final without further proceedings 35 days after service hereof unless appealed to the Judicial Officer within 30 days after service (7 CFR §§ 1.139, 1.145).

Copies hereof shall be served on the parties.

[The Decision and Order became final on April 14, 1986.—Ed.]

In re: FARMERS LIVESTOCK AUCTION, INC. P&S Docket No. 6266. Decided April 15, 1986.

Order dismissing appeal.

The Judicial Officer dismissed respondent's appeal at respondent's request, making Chief Judge Campbell's initial decision the final Decision and Order in the proceeding.

Donald Campbell, Judicial Officer.

Jory Hochberg, for complainant

Gerard Eftink, Kansas City, MO, for respondent

DECISION AND ORDER DISMISSING APPEAL

Pursuant to a conference telephone call between the Judicial Officer and attorneys for complainant and respondent, respondent requests that its appeal be dismissed. Accordingly, the appeal should be dismissed, with the initial Decision and Order of the ALJ becoming the final Decision and Order of the Secretary, with an appropriate change in the effective dates of the provisions in the order.

ORDER

Pursuant to its request, respondent's appeal is dismissed.

The initial Decision and Order filed in this proceeding on November 14, 1985, shall become the final Decision and Order of the Secretary, except that the effective date of the cease and desist provisions of the order shall be the day after service of this order upon respondent, and the suspension period shall begin on April 27, 1986.

In re: FARMERS LIVESTOCK AUCTION, INC. P&S Docket No. 6266. Decided November 14, 1985.

Dealer & Market Agency—Custodial account, failure to use and maintain properly—Guaranteeing prices to consignors—Providing free or reduced transportation costs to consignors—Suspended as a registrant.

Barbara S. Harris, for complainant.

Gerard D. Eftink, Kansas City, Missouri, for respondent.

Decision by John A. Campbell, Administrative Law Judge.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 et seq. hereafter referred to as the "Act"), instituted by a complaint on February 23, 1984.

The complaint alleges that the respondent willfully violated sections 307 and 312(a) of the Act (7 U.S.C. §§ 208, 213(a)), and section 2 of the regulations (9 CFR § 201.42), in that respondent failed to maintain and use properly its custodial account for shippers

proceeds. The complaint also charged respondent with willfully violating sections 307 and 312(a) of the Act (7 U.S.C. §§ 208, 213(a)), and section 201.64 of the regulations (9 CFR § 201.64) by guaranteeing certain consignors of livestock the minimum price they would receive from the sale of their livestock at the stockyard. A third allegation charged that respondent willfully violated sections 307 and 312(a) of the Act (7 U.S.C. §§ 208, 213(a)) by providing free or reduced trucking of livestock to consignors.

Respondent filed an answer on March 6, 1984, admitting the jurisdictional allegations of the complaint, but denying each of the substantive allegations of the complaint. On May 9, 1985, the parties filed stipulations wherein the respondent admitted the factual allegations of the complaint and stipulated to the authenticity and admissibility of complainant's exhibit numbers 1-47.

An oral hearing was held on May 15, 1985, in Fort Smith, Arkansas. Respondent was represented by Gerard D. Eftink, Esquire, Kansas City, Missouri. Complainant was represented by Barbara S. Harris, Office of the General Counsel, United States Department of Agriculture. At the close of the hearing, the time was set for the filing of briefs.

FINDINGS OF FACT

1. Farmers Livestock Auction, Inc., hereafter referred to as the respondent, is a corporation with its principal place of business located at Springdale, Arkansas. Its business mailing address is 1301 East Emma Avenue, Springdale, Arkansas 72764.

2. Respondent is, and at all times material herein was:

(a) Engaged in the business of conducting and operating the Farmers Livestock Auction, Inc., stockyard, a stockyard posted under and subject to the provisions of the Act, hereafter referred to as the stockyard;

(b) Engaged in the business of selling livestock on a commission basis at the stockyard, and buying and selling livestock in commerce for its own account; and

(c) Registered with the Secretary of Agriculture as a market agency to sell livestock on a commission basis, and as a dealer to buy and sell livestock for its own account.

3. Mr. Harold Sargent is the president of Farmers Livestock Auction, Inc.

4. Custodial Account

Market agencies are required to establish and maintain an account in which are placed funds received from the sale of consigned livestock. Such account must be maintained apart from the market agency's other accounts, as a separate bank account and trust fund.

Such account may be used only to pay the livestock sellers and to reimburse the market for its lawful marketing charges.

All funds received from the sale of consigned livestock are deposited directly to the custodial account. The market agency is required to reimburse that account by the close of the next business day for livestock sold to owners, officers, agents, employees, and anyone to whom the market has extended credit. The market agency is required to reimburse that account within seven days of the sale date for any uncollected proceeds receivable.

A market agency is required to maintain a custodial account because such agency sells livestock on commission for others. It receives funds from the sale of livestock, which are proceeds due to the livestock sellers. The custodial account is established so that such funds are protected for the benefit of the livestock sellers, as trust funds.

If the account is not properly maintained there will be insufficient funds in the account to pay the livestock sellers. Funds not properly maintained in the account lose their trust nature, and are not available for the benefit of the livestock seller, in the event of a financial failure of the market agency. Where the market agency has the funds properly protected, as trust funds in the custodial account, a lending bank has no right of offset against those funds, since it is a trust account. Custodial funds are protected by the federal deposit insurance corporation for the full limits of the insurance coverage for each individual consignor. In other words each individual consignor, who has funds in that account is protected to the limits of \$100,000.00, FDIC insurance.

When the market agency deposits its proceeds from a sale to its general account, rather than the custodial account, the funds are not protected as trust funds for the benefit of the livestock sellers, and lose the full benefits of the FDIC insurance.

The market agency is required to reimburse the custodial account for its owners, officers, and employees' purchases by the close of the next business day, rather than in seven days, as other buyers, because they are generally subject to the provisions of the Packers and Stockyard Act and subject to the payment requirements by section 409 of the Act. (7 U.S.C. 228 b). Further, such persons are involved with the market itself, and there is no need to allow additional time to collect the funds for the custodial account.

On the other hand, the market agency has seven days to reimburse the account for uncollected funds in order to give the market the opportunity to collect the funds from the buyer, rather than reimbursing the account from its own funds. (TR 9-12).

5. Prior to August 30, 1982, regulations were in effect which required that a market agency deposit to its custodial account on or before the third day after the sale of consigned livestock an amount equal to all uncollected proceeds receivable. The effect of this regulation was to require a market agency to borrow significant sums of money to put into the custodial account to cover uncollected proceeds. A task force, chaired by Mr. Harold Davis and composed of other employees of Complainant and attorneys from the Office of General Counsel reviewed this regulation along with others, and in a task force report made the following observations:

"The current requirements of section 201.42 that market agencies establish and maintain a separate account designated as a custodial account for shippers' proceeds were reviewed at length by the task force. All of the task force members were convinced of the necessity and reasonableness of a custodial account requirement. The task force members were of the singular view, based upon their experiences with the marketing of livestock through stockyards and auction markets, that the primary basis for the protection afforded by custodial or trust accounts is the requirement that market agencies deposit to the account, directly and as soon as possible after receipt, the proceeds from the sale of consigned livestock. The principles that each payment made by a buyer for livestock is a trust fund, and that funds deposited into the custodial account are also trust funds are fundamental to this protection. The task force does not recommend any change in these concepts.

We are also of the opinion that market agencies must be required to reimburse the custodial account, at some point in time, in the amount of the *uncollected receivables*. Our discussions focused on making a determination as to the appropriate and reasonable time to require such reimbursement. The task force concluded that a market agency should be allowed a period of *7 days following the sale of consigned livestock within which to reimburse the account for uncollected receivables*. We were acutely aware in formulating this recommendation of two factors. The first is our firm conviction that it is necessary to have a reimbursement requirement to afford a reasonable measure of protection to consignors. The second factor is the current high cost of borrowed money.

We do not believe a 7-day period would significantly diminish the level of protection of consignors' funds. The recommended 7-day period gives market agencies adequate time to collect from the buyers of consigned livestock. Thus our recommendation, if adopted, should reduce substantially the amount of funds market agencies must, under current requirements, either maintain on hand or borrow in order to reimburse the account. These savings will reduce the cost of doing business, or alternatively will be released for new investment. We believe the savings can be significant for small businesses and for the industry as a whole.

If a market agency chooses to extend credit to its buyers, then it should *continue to be required to reimburse the account by the close of the next business day*. We believe strongly that consignors should not be made to bear the risks associated with such extensions of credit. . . . (Emphasis added)"

6. Pursuant to this recommendation, the regulation was changed, effective August 30, 1982, so that market agencies thereafter were allowed seven days in which to put money into the custodial account to cover uncollected receivables. 9 CFR 201.42.

7. On or about September 16, 1982, Jack Bellow, Regional Supervisor of the Packers and Stockyards Administration, sent a letter to respondent, which respondent received. That letter read as follows:

Dear Sirs:

Section 201.42 of the regulations issued under the Packers and Stockyards Act, 1921, was amended effective August 30, 1982. This regulation sets forth the current requirements for the establishment and maintenance of custodial accounts for shippers' proceeds.

The principle changes in the regulation:

1. Provide for reimbursement of the custodial account for uncollected proceeds within 7 calendar days instead of 3 business days as was previously required;

2. Provide for maintenance of custodial funds in interest-bearing savings accounts as well as certificates of deposit (the savings account or certificate of deposit must be in the same bank in which the custodial account is maintained and the market agency must maintain sufficient funds in the custodial account to pay all checks as they are presented);
3. Clarify the requirement that the proceeds received be deposited directly to the custodial account unless the account has been reimbursed in full for the uncollected proceeds; and
4. Eliminate the net method of handling custodial funds.

A copy of the amended regulation is enclosed for your information. If you have any questions, please feel free to contact this office. (Rx. 1)

8. In the spring 1983, Ms. Loretta Bailey, an auditor with the Packers and Stockyards Administration's Memphis, Tennessee, Regional Office, conducted an audit of the respondent's business records. Ms. Bailey's analysis of respondent's custodial account for shippers' proceeds revealed that as of May 3, 1983, respondent had a shortage in its custodial account in the amount of \$9,764.92. As of that date, respondent had proceeds due shippers in the amount of \$0.30 and issued and outstanding custodial account checks in the amount of \$237,742.39, and had, to offset the outstanding checks, balances in its custodial bank accounts totalling \$195,460.61, no deposits in transit or proceeds on hand, and current proceeds receivable in the amount of \$32,517.16.

9. An analysis of respondent's general account as of May 3, 1983, revealed that respondent had insufficient funds in that account on that date to reimburse the custodial account for its shortage. As of May 3, 1983, respondent's general account had a balance per bank statement of \$3,140.11, and outstanding checks totalling \$46,253.15, resulting in a shortage of \$43,113.04.

10. As of March 29, 1983, respondent had a shortage in its custodial account in the amount of \$62,482.85. As of that date, respondent had issued and outstanding custodial account checks in the amount of \$335,980.43, and had, to offset the outstanding checks, balances in its custodial bank accounts totalling \$255,871.94, no deposits in transit, and current proceeds receivable in the amount of \$17,625.64.

11. An analysis of respondent's general account as of March 29, 1983, revealed that respondent had insufficient funds in that ac-

count on that date to reimburse the custodial account for its shortage. As of March 29, respondent's general account had a balance per bank statement of \$92,658.20, and outstanding checks totalling \$240,935.67, resulting in a shortage of \$148,277.47.

12. The shortages in respondent's custodial account described above were caused in part by the failure of respondent to deposit in its custodial account, within the respective time prescribed by the regulations an amount equal to the proceeds from purchases of consigned livestock by Harold Sargent, respondent's president.

13. The deficiencies in the custodial account were also caused by respondent's deposit to its general account of sale proceeds which should properly have been deposited immediately to its custodial account.

14. Respondent, during the period March 29, 1983, through May 3, 1983, failed to maintain and use properly its custodial account for shippers' proceeds thereby endangering the faithful and prompt accounting therefor and the payment of the portions thereof due the owners and consignors of livestock.

15. On December 9, 1969, the Judicial Officer of the United States Department of Agriculture issued a consent order against the respondent (*In re Farmers Livestock Auction, Inc.*, P. & S. Docket No. 4240). The respondent was ordered, *inter alia*, to cease and desist from (1) using funds received as proceeds from the sale, in commerce, of livestock handled on a commission basis for purposes of its own and purposes other than the remittance of net proceeds to shippers; (2) using funds received as proceeds for the sale, in commerce, of livestock handled on a commission basis in such manner as to endanger or impair the faithful and prompt accounting therefor and payment of the portions thereof due owners and consignors of livestock; and (3) failing to maintain its custodial account for shippers' proceeds in conformity with the provisions of section 201.42 of the regulations (9 CFR § 201.42).

16. Respondent, for the purpose of inducing certain owners to consign their livestock to the stockyard for sale, guaranteed to such owners or consignors of livestock the minimum price or prices which they would receive from the sale of their livestock at the stockyard, and in connection with such guarantees made payments or rebates to some consignors in addition to the net proceeds due from the sale of their livestock. A tabulation of consignors receiving price guarantees for their livestock is set forth in paragraph III of the complaint.

17. Respondent, for the purpose of inducing certain owners to consign their livestock to the stockyard for sale, provided free transportation of livestock or paid half the transportation charges

to certain consignors. A tabulation of consignors receiving free or reduced cost transportation of livestock is set forth in paragraph IV of the complaint.

CONCLUSIONS

All contentions of the parties have been considered in the light of the record evidence, and it is concluded that respondent has willfully violated the Act in that respondent:

- a. has failed to maintain and use properly its custodial account; and
- b. has committed unfair and unjust discriminatory practices in guaranteeing prices and providing free or reduced transportation costs to consignors.

Further, the order proposed by complainant is appropriate in view of the record evidence and is issued herewith.

CUSTODIAL ACCOUNT

The evidence introduced at the oral hearing establishes that on May 3, 1983, and March 29, 1983, respondent had shortages in its custodial account in the amounts of \$9,764.92, and \$62,482.85 respectively. By allowing such shortages to arise, respondent failed to maintain and use properly its custodial account in violation of the Act and regulations.

Every market agency subject to the Packers and Stockyards Act is required to establish and properly maintain a Custodial Account for Shippers' Proceeds (9 CFR § 201.42(b)). Section 201.42(c) of the regulations (9 CFR § 201.42(c)) in effect at the time of the alleged violations gives detailed instructions on how to properly maintain a custodial account:

(c) *Deposits in custodial accounts.* The market agency shall deposit in its custodial account before the close of the next business day (the next day on which banks are customarily open for business whether or not the market agency does business on that day) after livestock is sold (1) the proceeds from the sale of livestock that have been collected, and (2) an amount equal to the proceeds receivable from the sale of livestock that are due from (i) the market agency, (ii) any owner, officer or employee of the market agency, and (iii) any buyer to whom the market agency has extended credit. The market agency shall thereafter deposit in the custodial account all proceeds collected until the account has been reimbursed in full, and shall, before the close of

the seventh day following the sale of livestock, deposit an amount equal to all the remaining proceeds receivable whether or not the proceeds have been collected by the market agency.

Respondent urges that the failure to properly use and maintain the custodial account resulted from a misunderstanding of the task force report (Finding 5) and of the letter sent to him by the Packers and Stockyards Administration (Finding 7) which summarized the changes in the custodial account regulation. Respondent asserts that after reading the letter, respondent thought it had seven days to reimburse the custodial account, and thereafter, began waiting until the Thursday or Friday following the Friday sale to make full reimbursement.

The letter is short, unambiguous and to the point. It makes no attempt to set out the new regulation in full, but states clearly that it is pointing out only the changes in the regulation. Where a provision of the regulation was left intact, it was not outlined in the letter. Since the provision of section 201.42, which requires that proceeds due from owners be deposited by the close of the next business day was not specifically mentioned in the letter, it was unchanged by the amendment.

A copy of the amended regulation was enclosed with the letter and neither Mr. Sargent or Ms. Parsons, respondent's witnesses, could unequivocally state that the respondent did not receive such enclosure. The regulation states without qualification that proceeds due from owners must be deposited by the close of the next business day. By taking seven days, respondent succeeded in extending credit to itself.

Even under respondent's own view of the regulation, that it had seven days to reimburse the custodial account for uncollected funds, it was in violation. The evidence produced at the oral hearing established that respondent on two occasions took at least nine days to reimburse the custodial account. (Cx 3 p.2 and Cx 6 p.2) The teller's stamps show that the deposit to reimburse the custodial account for the April 29, 1983, sale was not delivered to the bank until May 9, 1983, and the deposit to reimburse the account for the March 25, 1983, sale was not made until April 4, 1983.

Complainant's exhibits numbered 1, 2, 4 and 5 reveal the reasons for the shortages in respondent's custodial account.

In the first instance, respondent consistently failed to deposit to its custodial account, in accordance with the regulations, amounts equal to the proceeds receivable due from Harold Sargent, its president and owner.

Under section 201.42(c) of the regulations, the respondent is required to reimburse the custodial account for its purchases or for the purchases of its owners or officers by the close of the next business banking day following the sale. Complainant's exhibits 1 (pages 1 and 7) and 4 (pages 1 and 8) show that contrary to the regulatory mandate, respondent failed to reimburse the custodial account for Mr. Sargent's purchases on the Mondays following the Friday sales. Thus, proceeds due from Harold Sargent for the sale date of April 29, 1983 were uncollected as of May 3, 1983 and proceeds due from him for purchases on March 25, 1983, remained uncollected on March 29, 1983.

The second reason for the shortages in respondent's custodial account was respondent's deposits to its general account of proceeds received from the sale of consigned livestock.

The Secretary has consistently held that the failure of a market agency to maintain its custodial account in accordance with the requirements of section 201.42 is a violation of sections 307 and 312(a) of the Act (7 U.S.C. §§ 208, 213(a)), as well as a violation of section 201.42 of the regulations (9 CFR § 201.42). *In re Arab Stock Yard*, 37 A.D. 293, 301-02, 310-02, 310-11 (1978); *aff'd* 582 F.2d 290 (CA 5 1978); *In re Sechrist Sales Co.*, 36 A.D. 665, 666, 671-75 (1977); *In re Hardy*, 33 A.D. 1383, 1398-1406 (1974).

Further, the Secretary has determined time and again that a market agency's failure to make deposits to its custodial account in the manner and within the times prescribed in section 201.42 is an unfair and deceptive practice. "It is deceptive because shippers do not know that their money is being used to extend credit to buyers. It is unfair because it is using trust money for their own purposes (to extend credit to themselves and others). It creates a risk that the consignors will not be paid." *In re Hardy, supra*, 33 A.D. 1400.

Respondent suggests that the concept of willfulness found in the case of *Leon Farrow and Knoke Livestock Buyers v. USDA*, 760 F.2d 211 (8th Cir. 1985) be applied in this case. This argument is not persuasive.

Leon Farrow and Knoke Livestock Buyers, Inc., were registered dealers under the Act authorized to buy and sell livestock in commerce. The dispute centered around the sale of "pound cows" at the Algona Livestock Auction and Exchange in Algona, Iowa. Knoke and Farrow were regular buyers at the exchange. Complainant had alleged that the two entered and carried out an agreement not to compete against each other in the purchase of pound cows. 760 F.2d at 212.

The Court of Appeals set aside the Judicial Officer's suspension order stating:

"We cannot sustain the JO's view that petitioners must have known their agreement was unlawful" 760 F.2d at 216.

The Court noted further at page 216:

"We are mindful that nothing in 7 U.S.C. § 204, authorizing suspensions, 'confines its application to cases of 'intentional and flagrant conduct' or denies its application in cases of negligent or careless violations.'" *Butz v. Clover Livestock Comm'n Co.*, 411 U.S. 182, 187 (1973). *Butz* was a case where the suspension order was based on violations committed in disregard of previous warnings, not present here. The Supreme Court also expressed doubt as to this court's premise that the Secretary's practice was to impose suspensions only in cases on international and flagrant conduct.

Here, however, the JO's decision indicates that under Department policy the admittedly severe order is predicated on the violation being flagrant and serious.

Although we think it the sounder view that the agreement between the two principal buyers at a small sale can be deemed an unfair practice, we have found no case on all fours."

The facts here and in *Farrow* are distinguishable. The latter case involved an agreement for the purchase of "pound cows" at a Livestock Auction. The present case involves the maintenance and proper use of the custodial account, a long standing regulatory requirement designed to protect the consignors of livestock. This requirement was not unknown to respondent.

A consent decision was issued against the respondent in 1969 for custodial account violations. Under the terms of the decision, respondent was ordered, *inter alia*, to cease and desist from failing to properly maintain its custodial account proceeds for its own purposes. (CX 46) It should also be noted that in September, 1982, respondent was notified by the Packers and Stockyards Administration of the August 30, 1982, changes in the custodial account regulations. (Finding 7) Despite its obvious awareness of the requirements of the regulations, however, respondent continued to deposit funds into the general account and to reimburse the custodial ac-

count for those deposits and its president's own purchases after the time set by regulations.

It must be concluded, therefore, that respondent's course of conduct with respect to the maintenance and use of its custodial account, as determined herein, constitutes a willful violation of the Act (7 U.S.C. §§ 208, 213(a)), and of the regulations (9 CFR § 201.42).

The definition of willfulness is well settled. A violation is willful if the respondent intentionally does an act which is prohibited, irrespective of evil motive or reliance on erroneous advice, or acts with careless disregard of statutory requirements. *Butz v. Glover Livestock Commission Co.*, 411 U.S. 182 (1973). The Supreme Court's position in *Glover* has been adopted by the Judicial Officer and is controlling in cases brought under the Packers and Stockyards Act. *In re Shatkin*, 34 Agric. Dec. 296 (1975). Thus, it is the standard to be employed in this case notwithstanding respondent's reliance upon cases decided under other statutory programs, or the holding in *Farrow*.

Respondent asserts that there was no likelihood of injury to consignors and, therefore, the shortages were merely technical. This contention must fail, however, as proof of likelihood of injury is not required in a custodial account case.

With respect to respondent's bank credit arrangements, decisions under the Act and regulations have held that a line of credit or over-draft protection extended by a bank is no defense to a charge that a custodial account for shippers' proceeds is not being maintained properly. *In re Sechrist Sales Co.*, *supra*, 36 A.D. at 668, 670-75. A line of credit does not provide the consignors of livestock and respondent's creditors the protection required by the Act and regulations. The relationship between Mr. Sargent and the First National Bank of Springdale may be cordial and longstanding, but as Mr. Parsons, the bank president, testified, the line of credit was subject to unilateral termination by the bank at his discretion.

Nor is respondent's assertion that no consignor was harmed by the shortages a meritorious defense. A consistent line of precedent has held that it is the duty of the Packers and Stockyards Administration to prevent potential injury by stopping unlawful practices in their incipency. *Farrow and Knoke v. U.S.D.A.*, *supra*, 760 F.2d at 215; *In re Miller*, 33 A.D. 53, 62, *aff'd sub. nom.* 498 F.2d 1088 (CA 5, 1974). As Harold Davis of the Packers & Stockyards Administration testified, the danger is ever present that a consignor will not get paid. (Tr. 10-12).

*Guaranteed Prices to Certain Consignors, and Reduced
Transportation Costs to Certain Consignors*

Respondent guaranteed to certain consignors of livestock a minimum price they would receive from the sale of their livestock, and in connection with such guarantees made payments to such consignors in addition to the net proceeds due from the sale of their livestock. Documentation of the transactions is found in complainant's exhibit numbers 8 through 19 representing the period February 11, 1983, through May 13, 1983. Those exhibits show that of the individuals who received price guarantees, some received money in excess of the proceeds due from the sale because their livestock was sold for an amount equal to or greater than the guarantee (CX 8, 9, 10, 12, 14, 16), while other consignors received additional compensation ranging from a low of \$5.66 (CX 18) to a high of \$143.48 (CX 13).

The Packers and Stockyards Administration has for many years considered this practice to be violative of sections 307 and 312(a) of the Act (7 U.S.C. §§ 208, 213(a)), and has issued a regulation specifically prohibiting the practice. That regulation provides that:

No market agency engaged in the business of selling livestock on a commission basis shall guarantee the price at which consigned livestock will be sold.

9 CFR § 201.64.

Harold Davis, Director of the Livestock Marketing Division of the Packers and Stockyards Administration, testified (Tr. 13-14) concerning why his agency considers price guaranteeing to be an unfair trade practice.

The Packers and Stockyards Administration feels that there are certain basic problems with price guaranteeing. The first being that this is a competitive practice which is, in our view, unfair competition for other markets, in that small markets may not be able to afford to make these guarantees and then be able to stand behind them if the market drops.

The Packers and Stockyards Administration also considers price guaranteeing to be a discriminatory practice, in that it's offers to certain consignors and not to all consignors and in that guarantee is not something that's offered to all consignors on an equal basis but rather something that's negotiated and offered on whatever it takes to get the livestock shipped to their market and not on the basis of offering the service to all consignors on an equal basis. Price

guarantees, in effect, are rebates on the commission or part of the commission that a consignor pays. This is an expense that the market incurs in doing business which is ultimately born by all the consignors and not just the consignors that receive a price guarantee.

As complainant contends, price guarantees are unjustly discriminatory regardless of whether or not they are offered to every consignor. There is no way to insure uniformity in the guarantees. For similar livestock, different consignors are likely to receive different guarantees, depending on what they negotiate. Further, when livestock fails to bring the guaranteed price, payments in the form of rebates are made to the consignor in the amount of the difference between the realized price and the guaranteed price. This payment will vary greatly between consignors, and as shown in CX 7, bears no relationship between the number of livestock consigned or the value of the livestock. The result of price guaranteeing is a chaotic situation in which some consignors receive no rebate while others receive rebates which vary greatly and at random. This is graphically illustrated in CX 20, an analysis of the price guarantee payments received by various consignors, which shows the variability of prices received for livestock and rebates received as a result of the guarantees.

Accordingly, respondent's practice of guaranteeing prices is an unfair and unjustly discriminatory practice in violation of sections 307 and 312(a) of the Act (7 U.S.C. §§ 208, 213(a)).

Analogous to the question of guaranteed prices is the practice of offering free or reduced transportation costs to certain consignors. In connection with some consignments of livestock to the stockyard, respondent paid all or half of the transportation charges. This was done as an inducement to obtain consignments of livestock to respondent's stockyard. Documentation of the transactions is found in complainant's exhibit numbers 21 through 44. Those transactions are summarized in CX 21, which shows that in fourteen instances consignors were reimbursed for one half of their transportation expenses and in nine transactions other consignors were reimbursed for all of their transportation expenses.

Harold Davis explained that his agency considers providing free trucking to consignors to be unlawful for the same reasons that apply to price guaranteeing:

Free trucking or reduced cost trucking is the same as price guaranteeing in that it is discriminatory between consignors. It's offered to certain consignors and not to others or its offered on an uneven basis to consignors. It's not of-

ferred on an equal basis to all consignors. So that it is unjustly discriminatory to the consignors. It is also considered to be unfair competition to competing markets and competing markets methods, in that the markets are competing on the basis of what gratuity they can offer to the consignor, rather than on the basis for the selling services and selling the livestock at the highest available bid in open competition.

TR. 15.

As the complainant correctly urges, the Packers and Stockyards Administration, considers free trucking unlawful for two reasons. The first reason is that it is an unfair method of competition which forces markets to compete on the basis of inducements rather than selling service, and places smaller markets at a competitive disadvantage. The second reason is that the provision of free trucking entails an unjust discrimination. In the present case, the discrimination occurs on one level because different consignors receive different "deals." Some have all of the trucking expenses paid, some have one half of their expenses paid, and others presumably receive no free trucking at all. On another level, the value of the free trucking varies among consignors, depending upon the distance of the haul. The net result is that, like in price guaranteeing, consignors receive rebates from the market in different amounts which vary in a random manner unrelated to the value of the livestock involved or the number of head consigned.

The Judicial Officer, adopting the conclusion of the administrative law judge in *In re Hardy*, 33 A.D. 1383, 1397 (1974), held:

We conclude that providing free trucking to consignors as an inducement to consign livestock to a particular market is an unfair practice and willful violation of section 307 and 312(a) of the Act and discriminates against those consignors not given such free trucking as well as being an unfair and unjust practice against competing markets forcing them to give free trucking in order for them to "stay in the game".

Respondent cites several federal court cases in support of its contention that paying for trucking and guaranteeing prices do not violate "nd regulations. However, these cases are not helpful nor relevant to the issue here. Here, we are dealing with livestock, and auction markets are fiduciaries for consignors fairly and equally. Some consignors get full price and others only got half. Some consignors

received money as a result of respondent's guaranteed prices and others did not.

SANCTION

Complainant requests that the respondent be ordered to cease and desist from the practices discussed above, and that it be suspended for a period of twenty-eight days (4 sale days) and thereafter until the deficits in its custodial account are corrected. The proposed suspension is proper in the circumstances of this proceeding.

The seriousness of the violations committed, especially the improper handling of the custodial account, go to the very essence of a market agency's responsibilities and, because of the firm's prior cease and desist order, the custodial account violations alone would warrant the proposed term of suspension.¹

Using custodial account funds for purposes of its own, guaranteeing prices to consignors and providing free trucking, demonstrate clearly that the respondent deliberately and willfully placed its interests ahead of its consignors and others in the livestock industry. Accordingly, respondent has willfully violated sections 307 and 312(a) of the Act (7 U.S.C. §§ 208, 213(a)), and sections 201.42 and 201.64 of the regulations (9 CFR §§ 201.42, 201.64), as alleged in the complaint.

ORDER

Respondent Farmers Livestock Auction, Inc., its officers, directors, agents and employees, in connection with its operations subject to the Act, shall cease and desist from:

1. Failing to deposit in its Custodial Account for Shippers' Proceeds, within the time prescribed in section 201.42 of the regulations (9 CFR § 201.42), amounts equal to the outstanding proceeds receivable due from the sale of consigned livestock;

2. Using funds received as proceeds from the sale of consigned livestock for purposes of its own or for any purpose other than for the payment of the net proceeds to the owners or consignors of such livestock, or for the payment of sums due the respondent as compensation for services rendered or for other lawful marketing charges;

3. Making such use or disposition of funds in its possession or control as will endanger or impair the faithful and prompt account-

¹ With respect to respondent's alleged shut-down in December 1984, the parties never reached an effective settlement agreement and, any purported shut-down on respondent's part was unilateral.

ing therefor and the payment of the portions thereof which may be due the owners or consignors of livestock;

4. Failing to otherwise maintain its Custodial Account for Shippers' Proceeds in strict conformity with the provisions of section 201.42 of the regulations (9 CFR § 201.42);

5. Guaranteeing to the owner or consignor of livestock the minimum price which the consignor will receive for such livestock consigned to respondent for sale on a commission basis; and

6. Providing free transportation, or transportation at less than its actual cost or value, of livestock consigned to respondent's stock yard.

Respondent is suspended as a registrant under the Act for 28 days and thereafter until it demonstrates that the deficit in its Custodial Account for Shippers' Proceeds has been eliminated. When respondent demonstrates that the deficit in its Custodial Account for Shippers' Proceeds has been eliminated, a supplemental order will be issued in this proceeding terminating this suspension after the 28 day period.

The provisions of this order shall become final and effective 30 days after service of this order on respondent, unless appealed within 30 days after service. (9 CFR §§ 1.145(a) and 1.142(c)).

Copies of this decision and order shall be served upon the parties

In re: JIM ZEILER, P&S Docket No. 6645. Decided April 18, 1986.

Edward H. McGrail, Administrative Law Judge.

Edward Silverstein, for complainant.

Pro se, for respondent

CONSENT DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondent wilfully violated the Act and the regulations issued thereunder (9 CFR § 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondent admits the jurisdictional allegations in paragraph I of the complaint and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure,

and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Jim Zeiler, hereinafter referred to as the respondent, is an individual whose business mailing address is 735 Dry Gulch Road, Stevensville, Montana 59870.

2. The respondent is, and all times material herein was:

(a) Engaged in the business of buying and selling livestock in commerce for his own account; and

(b) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce for his own account.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Jim Zeiler, his agents and employees, directly or through any corporate or other device, in connection with his business subject to the Packers and Stockyards Act, shall cease and desist from engaging in business in any capacity for which bonding is required under the Packers and Stockyards Act, as amended and supplemented, and the regulations, without filing and maintaining an adequate bond or its equivalent, as required by the Act and the regulations.

In accordance with section 312(b) of the Act (7 U.S.C. § 213(b)), respondent is hereby assessed a civil penalty in the amount of Three Hundred Fifty Dollars (\$350.00).

The provisions of this order shall become effective on the sixth day after service of this decision on the respondent.

Copies of this decision shall be served on the parties.

In re: CARROLL LIVESTOCK MARKET, INC. P&S Docket No. 65981
cided April 21, 1986.

Victor W. Palmer, Administrative Law Judge

Ben Bruner, for complainant.

William Polking, Carroll IA, for respondent.

CONSENT DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondent wilfully violated the Act and the regulations issued thereunder (9 CFR § 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondent admits the jurisdictional allegations in paragraph I of the complaint and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Carroll Livestock Market, Inc., hereinafter referred to as the respondent, is a corporation whose mailing address is Highway 5 West, Carroll, Iowa 51401.

2. Respondent is, and at all times material herein was:

(a) Engaged in the business of conducting and operating the Carroll Livestock Market, Inc., stockyard, a posted stockyard subject to the Act.

(b) Engaged in the business of selling livestock in commerce on a commission basis; and

(c) Registered with the Secretary of Agriculture as a market agency to sell livestock on a commission basis and as a dealer, buying and selling livestock in commerce for his own account.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent, its agents and employees, directly or indirectly through any corporate or other device, in connection with its activities subject to the Packers and Stockyards Act, shall cease and desist from:

1. Weighing livestock at other than their true and correct weights;
2. Paying the sellers or consignors of livestock on the basis of false or incorrect weights;
3. Issuing scale tickets, purchase invoices, or other accounts of sale on the basis of false or incorrect weights; and
4. Failing to maintain and operate livestock scales owned or controlled by respondent in such a manner as to insure accurate weights and otherwise in strict conformity with the requirements of section 201.73-1 of the regulations.

In accordance with section 312(b) of the Act (7 U.S.C. § 213(b)), respondent is assessed a civil penalty of Ten Thousand Dollars (\$10,000.00).

The provisions of this order shall become effective on the sixth day after service of this decision on the respondent.

Copies of this decision shall be served upon the parties.

In re: VIRGIL COTTRELL. P&S Docket No. 6679. Decided April 21, 1986.

Victor W. Palmer, Administrative Law Judge.

John J. Casey, for complainant.

For respondent, *pro se*.

CONSENT DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondent wilfully violated the Act and the regulations issued thereunder (9 CFR § 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondent admits the jurisdictional allegations in paragraph I of the complaint and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure,

and consents and agrees, for the purpose of settling this proceeding, and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Virgil Cottrell, hereinafter referred to as the respondent, is an individual whose business mailing address is 4209 Isleta, S.W., Albuquerque, New Mexico 87105.

2. The respondent is, and at all times material herein was:

(a) Engaged in the business of buying and selling livestock in commerce for his own account; and

(b) Registered with the Secretary of Agriculture as a dealer in buy and sell livestock for his own account.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent Virgil Cottrell, his agents and employees, directly or indirectly through any corporate or other device, shall cease and desist from

1. Issuing checks in payment for livestock purchases without having and maintaining sufficient funds on deposit and available in the accounts upon which such checks are drawn to pay such checks when presented;

2. Failing to pay, when due, the full purchase price of livestock; and

3. Failing to pay for livestock.

The respondent is suspended as a registrant under the Act for a period of five years, provided, however, that upon application to the Packers and Stockyards Administration a supplemental order may be issued terminating this suspension at any time after the expiration of 90 days upon demonstration by respondent that all livestock sellers have been paid in full, and provided further that this order may be modified upon application to the Packers and Stockyards Administration to permit respondent's salaried employment by another registrant after the expiration of the 90 day period of suspension.

The provisions of this order shall become effective on the seventh day after service of this order on the respondent.

Copies of this decision shall be served upon the parties.

In re: STOCKYARDS DAIRY SALE, INC., STOCKYARDS BEEF SALE, INC., STOCKYARDS, INC., SAMUEL E. HUBBERT, CURTIS HENRY HUBBERT, and TOMMY SMITH d/b/a MAGNOLIA CATTLE CO. P&S Docket No. 6682. Decided April 24, 1986.

Victor W. Palmer, Administrative Law Judge

Ben Bruner, for complainant

For respondent, *pro se*.

CONSENT DECISION WITH RESPECT TO TOMMY SMITH d/b/a MAGNOLIA CATTLE CO.

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondents wilfully violated the Act and the regulations issued thereunder (9 CFR § 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

Respondent Tommy Smith admits the jurisdictional allegations in paragraph I of the complaint as they pertain to him and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Tommy Smith, hereinafter referred to as respondent Smith, is an individual doing business as Magnolia Cattle Company. His mailing address is Route 1, Box 326, Tupelo, Mississippi 38801.

2. Respondent Smith, at all times material herein was:

(a) Engaged in the business of buying and selling livestock in commerce for his own account;

(b) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce for his own account; and

(c) Employed as auctioneer for respondent Stockyards Beef, in which capacity he conducted auctions at the facilities of Tupelo Stockyard, Inc.

CONCLUSIONS

Respondent Smith having admitted the jurisdictional facts as they pertain to him, and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent Smith, his agents and employees, directly or indirectly or through any corporate or other device, shall cease and desist from failing to pay, when due, the full purchase price of livestock.

Respondent Smith shall keep and maintain accounts, records and memoranda which fully and accurately disclose the true nature of all transactions involved in his business subject to the Packers and Stockyards Act, including:

1. A general ledger of accounts showing assets, liabilities, income, expenses and net worth;
2. Copies of all accounts of sale, purchase and sale invoices, and scale tickets;
3. Copies of all checks, bank statements and deposit tickets;
4. Journals of cash receipts and disbursements, and purchases and sales; and
5. Monthly reconciliations of all bank accounts.

Respondent Smith is suspended as a registrant under the Act for a period of 60 days.

The provisions of this order shall become effective on the sixth day after service of this decision on respondent Smith.

Copies of this decision shall be served on the parties.

In re: THURMAN GUILOTT and JOE MACK SMITH. P&S Docket No. 6634. Decided April 25, 1986.

John A. Campbell, Administrative Law Judge

Ben Bruner, for complainant.

Pro se, for respondent.

CONSENT DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondents wilfully violated the Act and the regulations issued thereunder (9 CFR § 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondents admit the jurisdictional allegations in paragraph I of the complaint and specifically admit that the Secretary has jurisdiction in this matter, neither admit nor deny the remaining allegations, waive oral hearing and further procedure, and con-

sent and agree, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Thurman Guilott and Joe Mack Smith, hereinafter referred to as the respondents, are partners doing business as Monk Cattle Company whose mailing address is P. O. Box 306, Poplarville, Mississippi 39470.

2. Respondents are, and at all times material herein were:

(a) Engaged in the business of a dealer buying and selling livestock in commerce for their own account, and the business of a market agency buying livestock in commerce on a commission basis; and

(b) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce on a commission basis.

CONCLUSIONS

The respondents having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondents Guilott and Smith, their agents and employees, directly or through any corporate or other device, shall cease and desist from engaging in business in any capacity for which bonding is required under the Packers and Stockyards Act, as amended and supplemented, and the regulations, without filing and maintaining a reasonable bond or its equivalent, as required by the Act and the regulations.

Respondents are suspended as a registrant under the Act until such time as they comply fully with the bonding requirements under the Act and the regulations. When respondents demonstrate that they are in full compliance with such bonding requirements, a supplemental order will be issued in this proceeding terminating this suspension.

In accordance with section 312(b) of the Act (7 U.S.C. § 213(b)), respondents are jointly and severally assessed a civil penalty in the amount of Three Hundred Fifty Dollars (\$350.00).

The provisions of this order shall become effective on the sixth day after service of this order on the respondents.

Copies of this decision shall be served upon the parties.

In re: TOM DEMRY and CHARLES DEMRY d/b/a CENTERVILLE SALE
Co. P&S Docket No. 6685. Decided April 25, 1986.

Dorothea A. Baker, Administrative Law Judge.

Ben Bruner, for complainant.

Sidney Drake, Centerville, Iowa, for respondent.

CONSENT DECISION AS TO TOM DEMRY

This proceeding was instituted under the Packers and Stockyard Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the financial condition of the Respondents does not meet the requirements of the Act and that the Respondents willfully violated the Act and the regulations issued thereunder (9 CFR § 201.1 *et seq.*). This decision is entered as to Respondent Tom Demry only pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The Respondent Tom Demry admits the jurisdictional allegations in paragraph I of the complaint and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

FINDINGS OF FACT

1. Tom Demry hereinafter referred to as the Respondent, is an individual formerly doing business as Centerville Sale Co. The business address was Box 71, Centerville, Iowa 52544.

2. Respondent, at all times material herein, was:

(a) Engaged in the business of conducting and operating the Centerville Sale Co. stockyard, a posted stockyard under the Act

(b) Engaged in the business of buying and selling livestock in commerce on a commission basis; and

(c) Registered with the Secretary of Agriculture as a marketing agency to sell livestock in commerce on a commission basis.

CONCLUSIONS

The Respondent having admitted the jurisdictional facts and having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent Tom Demry, his agents and employees, directly or through any corporate or other device, in connection with his oper

ations subject to the Packers and Stockyards Act, shall cease and desist from:

1. Failing to deposit in his Custodial Account for Shippers' Proceeds, within the time prescribed by section 201.42 of the regulations (9 CFR § 201.42), an amount equal to the proceeds receivable from the sale of consigned livestock;

2. Failing to otherwise maintain his Custodial Account for Shippers' Proceeds in strict conformity with the requirements of section 201.42 of the regulations;

3. Issuing checks to any person in payment of the net proceeds resulting from the sale of consigned livestock without having and maintaining sufficient funds on deposit and available in the bank account upon which they are drawn to pay such checks when presented;

4. Failing to remit, when due, the net proceeds from the sale of consigned livestock in commerce on a commission basis to the consignors; and

5. Failing to remit the net proceeds from the sale of consigned livestock in commerce on a commission basis to the consignors.

Respondent shall keep and maintain accounts, records and memoranda which fully and correctly disclose the true nature of all transactions involved in their business subject to the Packers and Stockyards Act, including (a) a general ledger of account showing assets, liabilities, income, expenses and net worth; (b) current check register of all checks issued to consignors in remittance of the net proceeds from the sale of consigned livestock; (c) monthly reconciliations of all bank accounts; and (d) all invoices of sales.

Respondent Tom Demry is suspended as registrant under the Act for a period of 120 days and thereafter until such time as he demonstrates that he is solvent and that the deficiency in his Custodial Account for Shippers' Proceeds has been eliminated. When the Respondent demonstrates that he is solvent and that the deficiency in his Custodial Account for Shippers' Proceeds has been eliminated a supplemental order will be issued in this proceeding terminating this suspension after the expiration of the 120 day period.

The provisions of this order shall become effective on the sixth day after service of this order on the Respondent.

Copies of this decision shall be served upon the parties.

In re: BUSHELLE CATTLE COMPANY, INC. P&S Docket No. 6639, D
cided March 19, 1986.

Victor W. Palmer, Administrative Law Judge.

Roberta Swartzendruber, for complainant

Joseph P. Smith, Dessert, Smith & Hunter, Park Rapids, Minnesota, for respondent

**DECISION AND ORDER UPON ADMISSION OF FACTS BY REASON OF
DEFAULT**

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq.*), herein referred to as the Act, instituted by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, charging that the respondent wilfully violated the Act and the regulations promulgated thereunder (9 CFR § 201.1 *et seq.*).

Copies of the complaint and Rules of Practice (7 CFR § 1.130 *et seq.*) governing proceedings under the Act were served on the respondent by certified mail. Respondent was informed in a letter of service that an answer should be filed pursuant to the Rules of Practice and that failure to answer would constitute an admission of all the material allegations contained in the complaint.

Respondent has failed to file an answer within the time prescribed in the Rules of Practice, and the material facts alleged in the complaint, which are admitted by respondent's failure to file an answer, are adopted and set forth herein as findings of fact.

This decision and order, therefore, is issued pursuant to section 1.139 of the Rules of Practice (7 CFR § 1.139).

FINDINGS OF FACT

1. (a) Bushelle Cattle Company, Inc., hereinafter referred to as the respondent, is a corporation organized and existing under the laws of the State of Minnesota. Respondent's business mailing address is Route 2, Box 336, Gonvick, Minnesota 56644.

(b) The respondent is, and at all times material herein was:

(1) Engaged in the business of buying and selling livestock in commerce for its own account; and

(2) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce for its own account and as a market agency to buy livestock in commerce on a commission basis.

2. Respondent was notified by certified mail on September 21, 1985, that the \$10,000.00 surety bond it maintained to secure the performance of its livestock obligations under the Act was being terminated on October 22, 1985. Respondent was further notified

that if it continued its livestock operations under the Act without providing a \$20,000.00 bond or its equivalent, it would be in violation of section 312(a) of the Act (7 U.S.C. § 213(a)), and sections 201.29 and 201.30 of the regulations. Notwithstanding such notice, respondent has continued to engage in the business of a dealer buying and selling livestock in commerce for its own account without maintaining an adequate bond or its equivalent as required by the Act and the regulations.

CONCLUSIONS

By reason of the facts found in Finding of Fact 2 herein, respondent has wilfully violated section 312(a) of the Act (7 U.S.C. § 213(a)), and sections 201.29 and 201.30 of the regulations (9 CFR §§ 201.29, 201.30).

ORDER

Bushelle Cattle Company, Inc., its officers, directors, agents and employees, directly or through any corporate or other device, in connection with its business subject to the Packers and Stockyards Act, shall cease and desist from engaging in business in any capacity for which bonding is required under the Packers and Stockyards Act, as amended and supplemented, and the regulations, without filing and maintaining an adequate bond or its equivalent, as required by the Act and the regulations.

Respondent is suspended as a registrant under the Act until it complies fully with the bonding requirements under the Act and the regulations. When respondent demonstrates that it is in full compliance with such bonding requirements, a supplemental order will be issued in this proceeding terminating the suspension.

In accordance with section 312(b) of the Act (7 U.S.C. § 213(b)), respondent is hereby assessed a civil penalty in the amount of One Thousand Dollars (\$1,000.00).

This decision and order shall become final without further proceedings 35 days after service hereof unless appealed to the Judicial Officer within 30 days after service (7 CFR §§ 1.139, 1.145).

Copies hereof shall be served on the parties.

[The Decision and Order became final on April 26, 1986.—Ed.]

In re: ROBERT WAGNER, P&S Docket No. 6563. Decided April 11, 1986.

John A. Campbell, Administrative Law Judge

Roberta Swartzendruber, for complainant.

Pierce & Pierce, Bushnell, Illinois, for respondent

CONSENT DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondent willfully violated the Act. This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondent admits the jurisdictional allegations in paragraph I of the complaint and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Robert Wagner, hereinafter referred to as the respondent, is an individual whose business mailing address is 1601 East Jackson, Lotterman Trailer Park, Macomb, Illinois 61455.

2. Respondent is, and at all times material herein was:

(a) Engaged in the business of a dealer, buying and selling live stock in commerce for his own account; and

(b) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce for his own account.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent Robert Wagner, his agents and employees, directly or through any corporate or other device, in connection with his activities subject to the Packers and Stockyards Act, shall cease and desist from:

1. Engaging in business as a market agency or dealer while insolvent, i.e., while his current liabilities exceed his current assets;

2. Issuing checks in payment for livestock without having and maintaining sufficient funds on deposit and available in the bank account(s) upon which such checks are drawn to pay such checks when presented;

3. Failing to pay, when due, the full purchase price of livestock; and

4. Failing to pay the full purchase price of livestock.

Respondent shall keep and maintain accounts, records and memoranda which fully and correctly disclose all transactions subject to the Act, including but not limited to: (a) a record of all cash receipts and disbursements; (b) copies of all accounts of sale and purchase invoices; and (c) a monthly reconciliation of his bank account including a list of all outstanding checks.

Respondent is suspended as a registrant under the Act for a period of 120 days and thereafter until he demonstrates that he is no longer insolvent. When respondent demonstrates that he is no longer insolvent, a supplemental order will be issued in this proceeding terminating this suspension after the expiration of the 120 day period.

The provisions of this order shall become effective on the sixth day after service of this decision on the respondent.

Copies of this decision shall be served on the parties.

MISCELLANEOUS DISCIPLINARY DECISIONS

In re: GREENVILLE LIVESTOCK, INC., and W. BRYAN HARGETT. P&S
Docket No. 6556. Decided March 17, 1986.

John A. Campbell, Administrative Law Judge.

Ben Bruner, for complainant.

Louis F. Foy, Jr., Brack & Foy, Trenton, North Carolina, for respondent

SUPPLEMENTAL ORDER

On March 3, 1986, an order was issued in the above-captioned matter, which, *inter alia*, suspended respondents as a registrant under the Act for seven (7) days and thereafter until respondents demonstrated that the shortage in their Custodial Account for Shippers' Proceeds has been eliminated.

Respondents have now demonstrated that the shortage in their Custodial Account for Shippers' Proceeds has been eliminated. Accordingly,

In re: ROBERT WAGNER, P&S Docket No. 6563. Decided April 30, 1986.

John A Campbell, Administrative Law Judge.

Roberta Swartzendruber, for complainant.

Pierce & Pierce, Bushnell, Illinois, for respondent

CONSENT DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondent wilfully violated the Act. This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondent admits the jurisdictional allegations in paragraph I of the complaint and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Robert Wagner, hereinafter referred to as the respondent, is an individual whose business mailing address is 1601 East Jackson, Lotterman Trailer Park, Macomb, Illinois 61455.

2. Respondent is, and at all times material herein was:

(a) Engaged in the business of a dealer, buying and selling livestock in commerce for his own account; and

(b) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce for his own account.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent Robert Wagner, his agents and employees, directly or through any corporate or other device, in connection with his activities subject to the Packers and Stockyards Act, shall cease and desist from:

1. Engaging in business as a market agency or dealer while insolvent, *i.e.*, while his current liabilities exceed his current assets;

2. Issuing checks in payment for livestock without having and maintaining sufficient funds on deposit and available in the bank account(s) upon which such checks are drawn to pay such checks when presented;

3. Failing to pay, when due, the full purchase price of livestock; and

4. Failing to pay the full purchase price of livestock.

Respondent shall keep and maintain accounts, records and memoranda which fully and correctly disclose all transactions subject to the Act, including but not limited to: (a) a record of all cash receipts and disbursements; (b) copies of all accounts of sale and purchase invoices; and (c) a monthly reconciliation of his bank account including a list of all outstanding checks.

Respondent is suspended as a registrant under the Act for a period of 120 days and thereafter until he demonstrates that he is no longer insolvent. When respondent demonstrates that he is no longer insolvent, a supplemental order will be issued in this proceeding terminating this suspension after the expiration of the 120 day period.

The provisions of this order shall become effective on the sixth day after service of this decision on the respondent.

Copies of this decision shall be served on the parties.

MISCELLANEOUS DISCIPLINARY DECISIONS

In re: GREENVILLE LIVESTOCK, INC., and W. BRYAN HARGETT. P&S
Docket No. 6556. Decided March 17, 1986.

John A. Campbell, Administrative Law Judge.

Ben Bruner, for complainant.

Louis F. Foy, Jr., Brack & Foy, Trenton, North Carolina, for respondent.

SUPPLEMENTAL ORDER

On March 3, 1986, an order was issued in the above-captioned matter, which, *inter alia*, suspended respondents as a registrar under the Act for seven (7) days and thereafter until respondent demonstrated that the shortage in their Custodial Account for Shippers' Proceeds has been eliminated.

Respondents have now demonstrated that the shortage in their Custodial Account for Shippers' Proceeds has been eliminated. Accordingly,

IT IS HEREBY ORDERED that the suspension provision of the order issued March 3, 1986, is terminated. The order shall remain in full force and effect in all other respects.

In re: ROBERT E. STAFFORD and CHARLES R. STAFFORD. P&S Docket No. 6381. Decided March 27, 1986.

Peter Train, for complainant

O. J. Taylor, for respondents

Decision by Donald A. Campbell, Judicial Officer.

ORDER VACATING STAY AND SETTING EFFECTIVE DATE OF SUSPENSION

Judicial review of the order dated December 3, 1984, issued in the above-captioned case has been completed. Therefore the stay order of January 3, 1985 and the amended stay order of January 14, 1985, are hereby vacated. The suspension provision of the order dated December 3, 1984, shall become effective on the 15th Day after service of this order on respondents.

In re: BLACKFOOT LIVESTOCK COMMISSION Co. P&S Docket No. 6107. Decided April 4, 1986.

Donald Campbell, Judicial Officer

Peter Train, for complainant.

Robert M. Cook, for respondent.

STAY ORDER

The suspension provisions of the order previously issued in this proceeding are hereby stayed pending the outcome of proceedings or judicial review.

The cease and desist provisions shall remain in effect.

DEE SORRELS P&S Docket No. 6590. Decided April

Administrative Law Judge.
complainant
se.

SUPPLEMENTAL ORDER

24, 1986, an order was issued in the above-captioned
inter alia, suspended respondent as a registrant
until such time as he fully complies with the bond-
its of the Act and the regulations. This order was
spondent on March 6, 1986, and became effective on
Respondent is now in compliance with the bonding
Accordingly,
BY ORDERED that the suspension provision of the
February 24, 1986, is terminated. The order shall
force and effect in all other respects.

ANN CATTLE CO. P&S Docket No. 6580. Decided April

Administrative Law Judge.
Truber, for complainant.
se

SUPPLEMENTAL ORDER

24, 1986, an order was issued in the above-captioned
inter alia, suspended respondent as a registrant
until such time as it complied fully with the bonding
under the Act and the regulations.
is now in compliance with such bonding require
ingly,
EBY ORDERED that the suspension provision of th
February 24, 1986, is terminated. The order sha
force and effect in all other respects.

In re: RICHARD D. BAUMERT. P&S Docket No. 6586. Decided April 17, 1986.

Dorothea A. Baker, Administrative Law Judge.

Andrew Stanton, for complainant

Isaac J. Tressler, for respondent

SUPPLEMENTAL ORDER

On December 19, 1985, an order was issued in the above-captioned matter, which, *inter alia*, suspended respondent as a registrant under the Act until such time as he complies fully with the bonding requirements under the Act and the regulations.

Respondent is now in compliance with such bonding requirements. Accordingly,

IT IS HEREBY ORDERED that the suspension provision of the order issued December 19, 1985, is terminated. The order shall remain in full force and effect in all other respects.

In re: TOM DEMRY and CHARLES DEMRY d/b/a CENTERVILLE SALE Co. P&S Docket No. 6685. Decided April 25, 1986.

Dorothea A. Baker, Administrative Law Judge.

Ben Bruner, for complainant.

Richard Schlegel II, Ottumwa, Iowa, for respondent.

ORDER OF DISMISSAL AS TO RESPONDENT CHARLES DEMRY

By reason of Complainant's Motion therefor, filed April 23, 1986, and for good cause shown, Respondent Charles Demry is dismissed as a party from this action.

Copies hereof shall be served upon the parties.

DISCIPLINARY DECISIONS

In re: GEORGE HOWARD d/b/a/ THE PRODUCE CO. PACA Docket No. 2-7060. Decided March 4, 1986.

John A. Campbell, Administrative Law Judge.

Andrew Stanton, for complainant.

For respondent, *pro se*.

DECISION AND ORDER (CONSENT)

PRELIMINARY STATEMENT

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*; hereinafter referred to as the "Act"), instituted by a Complaint filed on January 17, 1986, by the Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture.

The Complaint alleges that during the period January 1985 through June 1985, Respondent failed to make full payment promptly to 19 sellers of the agreed purchase prices, or balances thereof, in the total amount of \$206,562.07 for 63 lots of perishable agricultural commodities, which it purchased, received and accepted in interstate commerce. A copy of the Complaint was served upon Respondent. Respondent filed an Answer admitting the material allegations of the Complaint. The Respondent and Complainant have now agreed to the entry of a Decision and Order as set forth herein. Therefore, pursuant to Section 1.138 of the Rules of Practice (7 CFR 1.138), the following Decision and Order is issued without further procedure or hearing.

FINDINGS OF FACT

1. George Howard, d/b/a The Produce Co., (hereinafter "Respondent"), is an individual whose mailing address is 11th State Farmers Market, Chattanooga, Tennessee 37402.

2. Pursuant to the licensing provisions of the Act, license number 850544 was issued to Respondent on January 24, 1985. This license is next subject to renewal on or before January 24, 1986.

3. The Secretary has jurisdiction over Respondent and the subject matter involved herein.

4. As set forth more fully in paragraph 5 of the Complaint, during the period January 1985 through June 1985, Respondent failed to make full payment promptly to 19 sellers of the agreed purchase prices, or balances thereof, in the total amount of \$206,562.07 for 63 lots of perishable agricultural commodities purchased, received and accepted in interstate commerce.

CONCLUSIONS

Respondent has committed willful, flagrant and repeated violations of Section 2 of the PACA (7 U.S.C. 499b), by failing to make full payment promptly with respect to the transactions set forth in Finding of Fact No. 4 above, for which the Order below is issued.

ORDER

Respondent's license is revoked.

This order shall become effective March 17, 1986.

Copies hereof shall be served upon the parties.

In re: H. B. PRODUCE, INC. PACA Docket No. 2-7084. Decided March 14, 1986.

Dorothea A. Baker, Administrative Law Judge.

Edward Silverstein, for complainant.

For respondent, *pro se*.

DECISION AND ORDER (CONSENT)

PRELIMINARY STATEMENT

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.* hereinafter referred to as the "Act"), instituted by a Complaint filed on February 6, 1986, by the Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture.

The Complaint alleges that during the period December 1984 through March 1985, Respondent failed to make full payment promptly to 15 sellers of the agreed purchase prices, or balance thereof, in the total amount of \$120,060.60 for 363 lots of perishable agricultural commodities, which it purchased, received and accepted in interstate and foreign commerce. A copy of the Complaint was served upon Respondent. Respondent filed an Answer admitting the material allegations of the Complaint. The Respondent and Complainant have now agreed to the entry of a Decision and Order as set forth herein. Therefore, pursuant to Section 1.138 of the Rules of Practice (7 CFR 1.138), the following Decision and Order is issued without further procedure or hearing.

FINDINGS OF FACT

1. H. B. Produce, Inc., (hereinafter "Respondent") is a Massachusetts corporation whose mailing address is 17 Norrback Avenue, Worcester, Massachusetts 01606.

2. Respondent is not and has never been licensed under the PACA. Respondent, however, carried on the business of a commission merchant, dealer or broker as defined in Section 1 of the PACA (7 U.S.C. 499a), and was, therefore, subject to the licensing provisions of the PACA.

3. The Secretary has jurisdiction over Respondent and the subject matter involved herein.

4. As set forth more fully in paragraph 5 of the Complaint, during the period December 1984 through March 1985, Respondent failed to make full payment promptly to 15 sellers of the agreed purchase prices, or balances thereof, in the total amount of \$120,060.60 for 363 lots of perishable agricultural commodities purchased, received and accepted in interstate and foreign commerce.

CONCLUSIONS

Respondent has committed willful, flagrant and repeated violations of Section 2 of the PACA (7 U.S.C. 499b), by failing to make full payment promptly with respect to the transactions set forth in Finding of Fact No. 4 above, for which the Order is issued.

ORDER

A finding is made that Respondent has committed wilful, flagrant and repeated violations of Section 2 of the Act (7 U.S.C. 499b), and the facts and circumstances set forth above, shall be published.

This order shall become effective March 24, 1986.

Copies hereof shall be served upon the parties.

In re: J.P. DANIEL PRODUCE, INC. PACA Docket No. 2-6963. Decided February 3, 1986.

Dorothea A. Baker, Administrative Law Judge

Edward Silverstein, for complainant

For respondent, pro se.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*) hereinafter referred to as the "Act", instituted by a complaint filed on September 23, 1985, by the Acting Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture. It is alleged in the complaint that during the period November 1984 through March 1985, respondent purchased, received and accepted, in interstate and foreign commerce, from 21 sellers, 32 lots of fruits and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices or balances thereof in the total amount of \$203,514.55.

A copy of the complaint was served upon respondent which complaint has not been answered. The time for filing an answer having run, and upon the motion of the complainant for the issuance of a default order, the following Decision and Order is issued without further investigation or hearing pursuant to section 1.139 of the Rules of Practice (7 CFR 1.139).

FINDINGS OF FACT

1. Respondent, J. P. Daniel Produce, Inc., is a corporation, whose address is 356-357 Hunts Point Terminal Market, Bronx, New York 10474.

2. Pursuant to the licensing provisions of the Act, license number 821824 was issued to respondent on September 7, 1982, was renewed annually, presently is in effect, and was next subject to renewal on or before September 7, 1985.

3. As more fully set forth in paragraph 5 of the complaint, during the period November 1984 through March 1985 respondent purchased, received and accepted in interstate and foreign commerce, from 21 sellers, 32 lots of fruits and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices, or balances thereof, in the total amount of \$203,514.55.

CONCLUSIONS

Respondent's failure to make full payment promptly with respect to the 32 transactions set forth in Finding of Fact No. 3, above, constitutes willful, repeated and flagrant violations of Section 2 of the Act (7 U.S.C. 400b), for which the Order below is issued.

ORDER

Respondent's license is revoked.

This Order shall take effect on the eleventh day after this Decision becomes final.

Pursuant to the Rules of Practice governing procedures under the Act, this Decision will become final without further proceedings thirty-five days after service hereof, unless appealed to the Secretary by a party to the proceeding within thirty days after service as provided in sections 1.139 and 1.145 of the Rules of Practice (7 CFR 1.139 and 1.145).

Copies hereof shall be served upon the parties.

[The Decision and Order became final on March 26, 1986.—Ed.]

In re: WALTER GAILEY & SONS, INC. PACA Docket No. 2-6876. Decided April 8, 1986.

Failure to pay promptly for multiple produce transactions—License revoked
The Judicial Officer affirmed Judge Palmer's order revoking respondent's license for failure to pay promptly for about \$1½ million of produce. The Bankruptcy Code does not bar the bringing of an administrative disciplinary action. There is no applicable statute of limitations. The argument that creditors will suffer if respondent's license is revoked is routinely rejected in PACA cases.

Edward Silverstein, for complainant.

Stephen A. Markus, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*) in which Administrative Law Judge Victor W. Palmer (ALJ) filed an initial Decision and Order on January 23, 1986, revoking respondent's license for failure to pay promptly 57 sellers and on

* See generally Campbell, "The Perishable Agricultural Commodities Act Regulatory Program," in 1 Davidson, *Agricultural Law*, ch. 4 (1981 and Aug. 1985 Supp.), and Becker and Whitten, "Perishable Agricultural Commodities Act," in 10 Harl, *Agricultural Law*, ch. 72 (1980).

consignor almost \$1½ million for 320 lots of produce from October 1984 through March 1985. Much (or, more likely, most) of that amount remains unpaid to this date.

On March 3, 1986, respondent appealed to the Judicial Officer, to whom final administrative authority to decide the Department's cases subject to 5 U.S.C. §§ 556 and 557 has been delegated (7 CFR § 2.35).** On March 28, 1986, the case was referred to the Judicial Officer for decision.

Oral argument before the Judicial Officer, which is discretionary (7 CFR § 1.145(d)), was requested by respondent, but is denied inasmuch as the issues are not novel or difficult, the case has been thoroughly briefed, and oral argument would seem to serve no useful purpose.

Based upon a careful consideration of the entire record, the initial Decision and Order is adopted as the final Decision and Order in this case (with a few trivial changes), except that the effective date of the order is changed in view of the appeal. Additional conclusions by the Judicial Officer follow the ALJ's conclusions.

ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION

PRELIMINARY STATEMENT

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*), hereinafter referred to as the "Act", instituted by a complaint filed on July 8, 1985, by the Acting Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture. It is alleged in the complaint that during the period January through March 1985, respondent received and accepted 17 lots of vegetables, all being perishable agricultural commodities, on consignment, in interstate commerce, from one shipper, but failed to make full payment promptly of the net proceeds to that shipper in the total amount of \$58,677.74. Further, it is alleged that during the period October 1984 through March 1985, respondent purchased, received, and accepted, in interstate and foreign commerce, from 57 sellers, 303 lots of fruits and vegetables, all being perishable agricultural commodities, but failed to make full payment

** The position of Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C. §§ 460c-460g), and Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219 (1953), reprinted in 5 U.S.C. app. at 1068 (1982). The Department's present Judicial Officer was appointed in January 1971, having been involved with the Department's regulatory programs since 1949 (including 3 years' trial litigation; 10 years' appellate litigation relating to appeals from the decisions of the prior Judicial Officer; and 8 years as administrator of the Packers and Stockyards Act regulatory program).

promptly of the agreed purchase prices or balances thereof in the total amount of \$1,404,570.70.

A copy of the complaint was served upon respondent, which filed an answer thereto in which it generally denied the material allegations in the complaint, admitted the allegations in the complaint regarding its bankruptcy filing, and stated several affirmative defenses. Complainant now has filed a motion for a decision generally based on respondent's admission in its bankruptcy proceedings.¹ Based upon these admissions, the precedent which this forum is bound to follow² requires that complainant's motion be granted.³ Therefore, upon the motion of the complainant for the issuance of a default order, the following Decision and Order is issued without further investigation or hearing pursuant to section 1.139 of the Rules of Practice (7 CFR 1.139).

FINDINGS OF FACT

1. Respondent, Walter Gailey & Sons, Inc., is a corporation whose address is 4400 Woodland Avenue, Cleveland, Ohio 44104.

2. Pursuant to the licensing provisions of the Act, license number 206076 was issued to respondent on October 2, 1964, was renewed annually, presently is in effect, and is next subject to renewal on or before October 2, 1986.⁴

3. As more fully set forth in paragraph 5 of the complaint, during the period January through March 1985, respondent received and accepted, on consignment, in interstate commerce, 17 lots of vegetables, all being perishable agricultural commodities, but failed to make full payment promptly to one consignor of the

¹ Official notice is taken of the pleadings filed by respondent in this proceeding designated as Case No. B 85-399, U.S. Bkcy. Ct., N.D. Ohio.

² See *Fava & Company, Inc.*, 43 Agric. Dec. ____ (PACA Docket No. 2-6547, December 4, 1984) (Ruling on Certified Question).

³ In affirmative defense, respondent claims that the complaint "fails to state a claim . . . upon which relief can be granted"; however such an assertion is wholly without merit. See 7 U.S.C. § 499h. Respondent also claims that the provisions of the Bankruptcy Code bar the bringing of this action. Such an assertion also is without merit. In *re Fresh Approach, Inc.*, 49 B.R. 494 (Bkcy. N.C. Tex. 1985). Further, respondent's allegation that this action is barred by the "applicable statute of limitations" has no legal merit. *Melvin Beene Produce v. Agricultural Marketing Serv.*, 728 F.2d 347 (6th Cir. 1984). In addition, respondent claims that the shippers are barred from asserting any claim against it. Although stated as an affirmative defense, such a claim is irrelevant since the complainant is an official of the agency to which Congress has assigned the duty to administer the Act. See 7 U.S.C. § 499a(a). Respondent's last claim, that it should be allowed to reorganize under the Bankruptcy Code, is not a defense to an action for failure to make prompt payment under the Act. *Finer Foods Sales Co. v. Block*, 708 F.2d 774 (D.C. Cir. 1983).

⁴ Official notice is taken of respondent's 1985 license renewal.

net proceeds received from the sale thereof in the total amount of \$58,677.74.

4. As more fully set forth in paragraph 6 of the complaint, during the period October 1984 through March 1985 respondent purchased, received, and accepted in interstate and foreign commerce, from 57 sellers, 303 lots of fruits and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices, or balances thereof, in the total amount of \$1,404,570.70.

CONCLUSIONS

Respondent's failure to make full payment promptly with respect to the 320 transactions set forth in Findings of Fact Nos. 3 and 4 above constitutes willful, repeated and flagrant violations of Section 2 of the Act (7 U.S.C. 499b), for which the Order below is issued.

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

This case is identical, in all material respects, to *In re B. G. Sales Co.*, 44 Agric Dec. ____ (Oct. 9, 1985), a copy of which is attached as an appendix to this decision. The contentions argued by respondent on appeal are also rejected for the reasons set forth in Complainant's Reply to Respondent's Appeal. The argument that creditors will suffer if respondent's license is revoked was rejected in *In re Gilardi Truck & Transportation, Inc.*, 43 Agric. Dec. ____ (Jan. 27, 1984), as follows (slip op. at 32-33):

Respondent argues that it would be detrimental to its creditors if it were forced to discontinue business. Such arguments are frequently made and routinely rejected. Even where creditors of a respondent personally appear to urge the Department to permit the violator to continue in business, so that the violator will be able to make additional payments to the creditors, the Secretary routinely rejects such pleas for leniency made by creditors since the Secretary must consider the broader public interest, involving thousands of suppliers and licensees throughout the country.²¹ If lenient sanctions were imposed in the case of serious and flagrant violations of the Act for the benefit of a few of respondent's creditors, the sanctions would not have a strong deterrent effect and, therefore, such a policy would be contrary to the public interest.

Similarly, under all of the regulatory programs administered by the Department, any hardship to the respondent's

community, customers or employees which might result from a disciplinary order is given no weight in determining the sanction, in order to protect the broader public interest, which is best served by imposing severe sanctions for serious or repeated violations, to serve as an effective deterrent to future violations.²²

²¹ *In re Oliverio, Jackson, Oliverio, Inc.*, 42 Agric. Dec. [1151, 1170-72 (1983)]; *In re Bananas, Inc.*, 42 Agric. Dec. 426, 426-27 (order denying intervention), final decision, 42 Agric. Dec. [588, 606 (1983)], *In re Melvin Beene Produce Co.*, 41 Agric. Dec. 2422, 2441-42 (1982), [aff'd, 728 F.2d 347 (6th Cir. 1984)]; *In re V.P.C., Inc.*, 41 Agric. Dec. 734, 746 n.6 (1982); *In re Catanzaro*, 35 Agric. Dec. 26, 34-35 (1976), aff'd, No. 76-1613 (9th Cir. Mar. 9, 1977), printed in 36 Agric. Dec. 467.

²² *In re Powell*, 41 Agric. Dec. 1354, 1365 (1982); *In re Hatcher*, 41 Agric. Dec. 662, 670-71 (1982), *In re Gus Z. Lancaster Stock Yards, Inc.*, 38 Agric. Dec. 824, 825 (1979); *In re Sol Salins, Inc.*, 37 Agric. Dec. 1699, 1737-38 (1978); *In re Arab Stock Yard, Inc.*, 37 Agric. Dec. 293, 302, 311, aff'd mem., 582 F.2d 39 (5th Cir. 1978); *In re Cordele Livestock Co.*, 36 Agric. Dec. 1114, 1128-29, 1136 (1977), aff'd mem., 575 F.2d 879 (5th Cir. 1978); *In re Red River Livestock Auction, Inc.*, 36 Agric. Dec. 980, 989-90 (1977); *In re Livestock Marketers, Inc.*, 35 Agric. Dec. 1552, 1562 (1976), aff'd per curiam, 558 F.2d 748 (5th Cir. 1977), cert. denied, 435 U.S. 968 (1978); *In re Overland Stockyards, Inc.*, 34 Agric. Dec. 1808, 1851-52 (1975); and see *In re L.R. Morris Produce Exch., Inc.*, 37 Agric. Dec. 1112, 1120-21 (1978); *In re Armour & Co.*, 37 Agric. Dec. 109, 112 (1978).

For the foregoing reasons, the following order should be issued.

ORDER

Respondent's license is revoked.

The facts and circumstances set forth above should be published.

This order shall become effective on the 30th day after service on respondent.

APPENDIX

In re: B. G. Sales Co., 44 Agric. Dec. ____ (Oct. 9, 1985).

REPARATION DECISIONS

P. TAVILLA CO. MIAMI INC., *v.* SANCO DISTRIBUTORS, INC., *a/t/a* SANDY'S MARKET BASKET. PACA Docket No. 2-6756. Decided March 7, 1986.

Unsworn answer given no consideration as evidence—Decision.

Respondent liable for the contract price alleged in the complaint, as its claims that the price was a lesser figure and that it made cash payments in its unsworn answer only, which is not given any evidentiary consideration.

Andrew Stanton, Presiding Officer.

Richard L. Katz, Coral Gables, Florida, for complainant.

Pro se, for respondent

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of \$5,840.00 in connection with the sale and shipment of five loads of mixed produce to respondent in interstate commerce.

A copy of the report of investigation prepared by the Department was served upon each of the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto, admitting liability for \$3,721.75, but denying liability for the remainder.

Since the amount claimed as damages does not exceed \$15,000, the shortened procedure provided in section 47.20 of the Rules of Practice (7 CFR § 47.20) is applicable. Pursuant to such procedure, the report of investigation is considered part of the evidence, as is the verified complaint. The answer, since it is not verified, is not considered part of the evidence. The parties were given an opportunity to submit additional evidence in the form of verified statements and to file briefs, but elected not to do so.

FINDINGS OF FACTS

1. Complainant, P. Tavilla Co. Miami Inc., is a corporation whose address is 1243 N. W. 21st Street, Miami, Florida.
2. Respondent, Sanco Distributors, Inc., *a/t/a* Sandy's Market Basket, is a corporation whose address is 2840 North State Road 7, Hollywood, Florida. At the times of the transactions involved herein, respondent was licensed under the Act.

3. On approximately July 16, 19, 21, and 23, and August 11 and 17, 1984, complainant sold to respondent a total of six loads of mixed produce for a total contract price of \$6,840.00, f.o.b. The produce was shipped to respondent, which received and accepted it.

4. Respondent has since paid complainant \$1,000.00 for the six loads of produce, leaving \$5,840.00 due and owing. A formal complaint was filed on January 29, 1985, which was within nine months from when the causes of action herein accrued.

5. Respondent filed an answer on March 5, 1985, in which it admitted liability for \$3,721.75 in connection with the subject matter of the complaint. Accordingly, an Order Requiring Payment of Undisputed Amount was issued on April 29, 1985, ordering respondent to pay to complainant the admitted amount owing of \$3,721.75.

PRELIMINARY STATEMENT

In respondent's unsworn answer, it claims that it originally owed complainant \$5,721.75 for the six loads of produce it admittedly purchased, received, and accepted, but contends that it made \$1,000 cash payments on January 19 and February 22, 1985, thereby reducing its liability to \$3,721.75, which it admits owing complainant. As a result of respondent's admission of liability, an Order Requiring Payment of Undisputed Amount was issued on April 29, 1985, awarding reparation to complainant in the amount of \$3,721.75.

Complainant alleges in its sworn complaint that the contract prices on the six lots of produce totaled \$6,840.00, and claims the respondent has only paid \$1,000.00, leaving \$5,840.00 still owing. Complainant has provided invoices and statements to respondent which support its claim. Respondent's contentions that it originally owed \$5,721.75 but has made two recent cash payments of \$1,000.00 are contained in an unsworn answer and, therefore, are not worthy of evidentiary consideration. As respondent did not make any further submissions in this proceeding, we must conclude that the sworn allegations of the complaint and the supporting documentation are sufficient to establish respondent's liability for the amount claimed. Therefore, respondent is liable for \$5,840.00 less the \$3,721.75 already awarded, or \$2,118.25. Respondent's failure to pay complainant this sum is a violation of section 2 of the Act, for which reparation should be awarded, with interest.

ORDER

Within 30 days from the date of this order, respondent shall pay to complainant, as reparation, \$2,118.25, with interest thereon at the rate of 13% per annum from September 1, 1984, until paid.

Copies of this order shall be served upon the parties.

S. STAMOULES, INC., a/t/a STAMOULES PRODUCE CO., v. SOL SALINS, INC. PACA Docket No. 2-6795. Decided March 7, 1986.

Change in contract terms—Breach of warranty—Accord and satisfaction—
Decision.

Evidence in the record fails to support respondent's claims that complainant granted an allowance, the produce was in breach of warranty, and an accord and satisfaction occurred. Therefore, respondent is liable for the full contract price of the produce it admittedly accepted.

Andrew Stanton, Presiding Officer

Thomas R. Oliveri, Newport Beach, California, for complainant.

Robert Silberberg, McLean, Virginia, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of \$1,008.00 in connection with the sale and shipment to respondent of a trucklot of cantaloupes in interstate commerce.

A copy of the report of investigation prepared by the Department was served upon each of the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto, denying liability.

Since the amount claimed as damages does not exceed \$15,000.00, the shortened procedure provided in section 47.20 of the Rules of Practice (7 CFR § 47.20) is applicable. Pursuant to such procedure, the report of investigation is considered part of the evidence, as is the verified complaint and answer. The parties were given an opportunity to submit additional evidence in the form of verified statements and to file briefs. Complainant submitted an opening statement, respondent submitted an answering statement, and complainant submitted a statement in reply. Complainant also filed a brief.

FINDINGS OF FACT

1. Complainant, S. Stamoules, Inc., a/t/a Stamoules Produce Co., is a corporation whose address is P.O. Box 56, Mendota, California.

2. Respondent, Sol Salins, Inc., is a corporation whose address is 1325 Fifth Street, N.E., Washington, D. C. At the time of the transaction involved herein, respondent was licensed under the Act.

3. On approximately July 9, 1984, complainant sold and shipped in interstate commerce to respondent 1,008 cartons of S & S Brand size 18 cantaloupes at \$5.00 per carton, plus \$.70 per carton pre-cooling, \$.10 per carton palletization, \$.15 per carton for brokerage fees and \$22.50 for a temperature recorder, for a total f.o.b. contract price of \$6,020.10. George DePaoli Distributing Company, Salinas, California, acted as the broker in this transaction, and both parties communicated exclusively through its president, George DePaoli.

4. After the cantaloupes arrived, respondent complained to Mr. DePaoli about the size of the melons, and requested an allowance. Mr. DePaoli contacted complainant's salesman, Rick Evans, who indicated that an allowance would be considered if respondent would provide an inspection report showing that the cantaloupes did not comply with the contract terms regarding their size. Respondent never provided the inspection report.

5. In August 1984, respondent sent complainant a check for \$5,012.10 as payment for the load of cantaloupes. Nothing written on the check indicated that it was being offered as full payment. Complainant accepted and deposited the check. Respondent has not made any additional payments on this transaction.

6. A formal complaint was filed on March 1, 1985, which was within nine months from when the cause of action herein accrued.

CONCLUSIONS

Respondent does not deny purchasing, receiving and accepting the cantaloupes, but claims that after the cantaloupes arrived, complainant agreed to a \$1.00 per crate allowance because the fruit was too small. Complainant denies having agreed to an allowance and has submitted the sworn statement of its salesman, Rick Evans, who states that he made clear to the broker that complainant would have to receive an inspection report showing that there was a problem with the size of the cantaloupes before any allowance could be considered. Respondent, as the party alleging that the contract terms were changed, has the burden of proving such a change by a preponderance of the evidence. *American Banana Co., v. Marvin Gray*, 41 Agric. Dec. 539 (1982).

The report of investigation contains a February 19, 1985, letter to the Department from the broker's president, George DePaoli, who states that after hearing from respondent about the size problems, "I called Rick and reported this to him, I told him I would get an

inspection, my complaint was sizing never mentioning the condition. Several weeks later, Rick and I agreed on a \$1.00 allowance, providing he had a federal inspection showing the sizing was small." Complainant's Mr. Evans claims an inspection report was never provided, and an allowance, therefore, was not warranted. The record in this proceeding does not contain any inspection reports. However, it is apparently respondent's position that the \$1.00 per carton allowance was granted with no contingencies, and respondent has offered a sworn statement from Mr. DePaoli dated July 8, 1985, who asserts that in "late July 1984 Rick authorized this deduction." This statement does not specifically refute Mr. DePaoli's earlier statement that the allowance was contingent on respondent providing complainant with the inspection report. In addition, the February 9, 1985, statement is closer in time to the date of the alleged conversation than the statement of July 8, 1985. Further, Mr. DePaoli's February 9, 1985, statement sets forth the same facts as those expressed by complainant's Mr. Evans, the other party to the alleged conversation. Therefore, we believe the February 9, 1985, statement to be more credible, and conclude that respondent has failed to sustain its burden of proving that the allowance was granted.

Having accepted the load of cantaloupes, respondent became liable for the contract price, less damages resulting from any breach of warranty. Respondent has the burden of proving the breach and damages by a preponderance of the evidence. *Farm Market Service Inc. v. Albertson's, Inc.*, 42 Agric. Dec. 429 (1983). As previously mentioned, respondent never submitted an inspection report showing that the cantaloupes were in breach of warranty. Since the record is devoid of any credible evidence of the existence of a breach of warranty by complainant, we conclude that respondent has failed to sustain its burden of proof in this regard, and is liable for the entire contract price of \$6,020.10, less the \$5,012.10 it has already paid.

Respondent contends that complainant's acceptance of its \$5,012.10 check constituted an accord and satisfaction, thereby relieving respondent from any further liability. This contention is without merit, as an examination of the check shows that it did not contain any notation that it was offered in full settlement of the transaction for which it was given in payment. *Dennis Produce Sales, Inc. v. Caruso-Ciresi, Inc.*, 42 Agric. Dec. 178 (1983).

Respondent is liable for the difference between the contract price of \$6,020.10 minus the \$5,012.10 paid to complainant, or \$1,008.00, and its failure to pay this sum to complainant is a violation of sec-

tion 2 of the Act, for which reparation should be awarded, with interest.

ORDER

Within 30 days from the date of this order, respondent shall pay to complainant, as reparation, \$1,008.00, with interest thereon at the rate of 13% per annum from August 1, 1984, until paid.

Copies of this order shall be served upon the parties.

DEW-GRO INC., d/b/a CENTRAL WEST PRODUCE v. MINGS IMPORT,
INC. PACA Docket No. 2-6814. Decided March 7, 1986.

Wrongful rejection—Mitigation of Damages

Where only evidence concerning quality of sugar peas shipped was respondent's admission that U.S.D.A. inspection graded them "A", complainant has met its burden of shipping goods in suitable shipping condition. Complainant gave notice that it was moving the goods to a wholesaler after receiver refused to pay. Even though the goods were ultimately dumped, complainant is entitled to receive full contract price because respondent failed to show that the complainant acted improperly in its efforts to mitigate its damages by finding an alternative outlet.

Peter V. Tran, Presiding Officer.

Thomas R. Oliveri, Newport Beach, California, for complainant

Daniel F. Lenzo, Boston, Massachusetts, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*), hereinafter referred to as the Act. A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of \$2,737.80 in connection with the sale of sugar peas in interstate commerce.

A copy of the formal complaint and a copy of the Department's report of investigation was served upon respondent. A copy of the report of investigation was served upon complainant.

Respondent failed to file a timely answer. However, prior to the issuance of a default order, respondent filed a motion to reopen the proceeding after default and allow the filing of an answer. This motion was granted on May 6, 1985, and respondent's answer was accepted. Respondent's answer denied that the goods received were

as contracted for and asserted that they were, therefore, properly rejected.

Since the amount claimed in damages does not exceed \$15,000.00, the shortened procedure provided for in section 47.20 of the Rules of Practice (7 CFR § 47.20) applies. Pursuant to such procedure, the parties were given an opportunity to submit additional evidence in the form of verified statements. Complainant filed an opening statement in the form of an additional affidavit. Respondent did not file an answering statement. Complainant also filed a brief.

FINDINGS OF FACT

1. Dew-Gro, Inc., doing business as Central West Produce, hereinafter referred to as complainant, is a corporation whose post office address is 1284 West Main Street, Santa Maria, California 93451.

2. Mings Import, Inc., hereinafter referred to as respondent, is a corporation whose post office address is 85 Essex Street, Boston, Massachusetts 02111.

3. Both complainant and respondent are, and at the time of the transaction in question herein were, licensed with the Secretary of Agriculture to do business under the Act.

4. On or about May 18, 1984, complainant sold to respondent, in the course of interstate commerce, 78 cartons of sugar peas at \$33.25 per carton plus \$1.05 per carton for cooling and pallets, and freight of \$.80 per carton. The total F.O.B. contract price was therefore \$2,737.80.

5. The sugar peas were shipped by complainant from California to respondent in Boston, Massachusetts on May 18, 1984.

6. Upon their arrival in Boston, however, respondent sought to reject them claiming they were not in acceptable condition.

7. Respondent, however, in a letter to the Acting Regional Director, Northeast Region, PACA Branch dated August 27, 1984 and contained in the Report of Investigation as Exhibit No. 3, admitted that a U.S.D.A. inspector inspected the peas and found them to be "Grade A".

8. In a telegram dated May 21, 1984, complainant informed respondent that based upon respondent's rejection, complainant was moving the peas to Peter Condakes, a local wholesaler, to be sold on the account of whom concerned.

9. The peas, were, however, ultimately dumped as having no market value, apparently on June 26, 1984.

10. Respondent has not paid for these peas.

11. The formal complaint was filed on October 26, 1984, within nine months of the accrual of the cause of action herein.

CONCLUSIONS

There is no dispute that the peas were shipped from California and received in Boston. The parties differ as to the quality and condition of the peas on their arrival. The record is not clear at what point in time respondent notified complainant it was refusing to pay for the peas. It, therefore, can not be determined whether the respondent had first accepted the goods. In view of the ultimate disposition made herein, however, it is not necessary to reach this question. It is sufficient to say that the parties treated respondent's actions as a rejection, and that complainant promptly arranged to have the peas moved to Peter Condakes for sale on account.

Respondent's defense to this action is that the peas were not of the quality contracted for. However, the only evidence relating to the quality of peas upon arrival is respondent's admission that a U.S.D.A. inspection resulted in a finding that the peas were "grade A". To argue that the inspector was wrong, without more, falls far short of establishing that complainant failed to ship goods conforming to the contract. The date and details of the inspection as the only impartial evidence indicates that the peas received were of the quality contracted for, we find that complainant met its burden of shipping goods in suitable shipping condition. Respondent has therefore, wrongfully failed to pay for the peas.

There is no allegation or evidence that Peter Condakes was firm unqualified to dispose of the disputed goods, or that the firm failed to properly do so. Therefore, it is found that complainant made reasonable efforts to mitigate its damages, but to no avail. The risk of loss after a wrongful rejection falls on the purchaser under the factual circumstances existing here, absent a showing that the shipper acted improperly in its efforts to find an alternative outlet. *See, Sid Lipsig & Co. v. Joe Belsen*, 34 Agric. Dec. 417, 422 (1975).

Complainant is entitled to receive the value of the goods shipped which is measured by the contract price of \$2,737.80. Respondent's failure to pay that amount is a violation of section 2 of the Act for which reparation should be awarded with interest.

ORDER

Respondent Mings Import, Inc., is hereby ordered to pay complainant Dew-Gro, Inc. the amount of \$2,737.80 plus interest at 18 percent per annum from June 1, 1984, until paid.

Copies of this Order shall be served on the parties.

SUN WORLD INTERNATIONAL, INC., a/t/a SUN WORLD, v. CORGAN & SON, INC. PACA Docket No. 2-6806. Decided March 10, 1986.

Complainant was the seller—Payment made to the wrong party—Breach of warranty—Respondent failed to prove—Price arrival terms in effect—Failure to deliver—Decision.

The evidence is clear that complainant was the seller of the three loads of brussels sprouts. Respondent's payment to the broker for the first load did not relieve it of liability to the complainant seller. Respondent failed to prove a breach of warranty regarding the second load and is liable for the market price at destination, in accordance with the price arrival terms in effect. The evidence shows that the third load was not delivered to respondent. Respondent liable for only the first two loads.

Andrew Stanton, Presiding Officer

For complainant, *pro se*

For respondent, *pro se*.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of \$17,595.25, in connection with the alleged sale and shipment to respondent of three truckloads of brussels sprouts in interstate commerce.

A copy of the report of investigation prepared by the Department was served upon each of the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto, denying liability.

Although the amount claimed as damages exceeds \$15,000.00, the parties waived oral hearing. Therefore, the shortened procedure provided in section 47.20 of the Rules of Practice (7 CFR 47.20) is applicable. Pursuant to such procedure, the report of investigation is considered part of the evidence, as is the verified complaint. The answer, since it is not verified, is not considered part of the evidence. The parties were given an opportunity to submit additional evidence in the form of verified statements and to file briefs, but elected not to do so.

FINDINGS OF FACT

1. Complainant, Sun World International, Inc. a/t/a Sun World, is a corporation whose address P.O. Box 9110, Bakersfield, California.
2. Respondent, Corgan & Son, Inc., is a corporation whose address is 161-162 N.Y.C. Terminal Market, Bronx, New York. At the

times of the transactions involved herein, respondent was licensed under the Act.

3. On approximately March 22, 1984, complainant sold and shipped to respondent 300 cartons of brussels sprouts in 25 pound cartons, at a price of \$8.00 per carton, plus \$.65 per carton pre-cooling, for a total of \$2,595.00, f.o.b. The broker in this transaction was Go/Western Produce & Commodities Inc., Coachella, California. Complainant prepared an invoice, number 85-23880, reflecting these terms. Respondent received and accepted the sprouts.

4. On March 23, 1984, the broker prepared and sent to the parties a confirmation of sale and broker's invoice relating to complainant's invoice number 85-23880. The confirmation identified complainant as the seller and respondent as the buyer.

5. Respondent issued a check to the broker on April 26, 1984, for \$4,418.60, including payment of \$1,500.00 for the 300 cartons of sprouts which are the subject of complainant's invoice number 85-23880. Respondent has never made any payment to complainant on this transaction.

6. On or about April 5, 1984, complainant sold to respondent 1,980 cartons of brussels sprouts in 25 pound cartons, at a price of \$6.00 per carton, plus \$.65 per carton cooling, for a total of \$13,128.50, f.o.b. Go/Western Produce & Commodities Inc. acted as the broker in this transaction. Complainant prepared an invoice, number 70-24058, reflecting the contract terms. The price terms were eventually changed to price arrival.

7. On April 16, 1984, respondent received and accepted the sprouts pertaining to complainant's invoice number 70-24058. According to the April 16, 1984, listings of the Market News Service Reports for Bronx, New York, the market price for brussels sprouts in 25 pound cartons was \$7.00 to \$8.00 per carton.

8. On May 4, 1984, the broker prepared and sent to the parties a confirmation of sale relating to complainant's invoice number 70-24058, which indicated thereon that the price terms were "P/A".

9. On April 19, 1984, complainant loaded 295 cartons of brussels sprouts on a Pathfinder truck for shipment to respondent. The sprouts were instead shipped to Veg-A-Mix, Castroville, California.

10. On October 26, 1984, complainant's Director of Transportation, Fred Kendel, stated in a letter to the Department that with respect to the 295 cartons of brussels sprouts, "Pathfinder Trucking, Los Angeles, does not perform transport to the eastern states. I have contacted their office to ascertain the exact location of their delivery and we should have an answer from them in the very near future."

11. On November 8, 1984, Mr. Kendel wrote a letter to Veg-A-Mix concerning the 295 cartons of brussels sprouts set forth, in part, as follows:

We are tracing the final disposition of product we shipped earlier this year. We have discovered your firm was involved in the distribution of our product and we would appreciate your assistance in helping us to identify the ultimate receiver.

On April 19, 1984, we loaded 295 cartons Sun World label brussels sprouts and 785 cartons sprouts (Go/Western-packer) into a Pathfinder truck. We understood the product was destined to Corgan and Son in New York City as arranged by Diamond Trading, Palm Desert, California, but this information was erroneous. Instead, Pathfinder Trucking delivered the product to your facility on April 20, 1984. Distribution from that point in time is the unknown factor and we would ask for your assistance.

12. Respondent has not paid anything to complainant for the 295 cartons of sprouts referred to above.

13. An informal complaint was filed on July 5, 1984, which was within nine months from when the alleged causes of action herein accrued. A formal complaint was filed on February 19, 1985.

CONCLUSIONS

Respondent denies liability for the three loads of brussels sprouts at issue. Respondent claims it never made any purchases from complainant, although it admits having purchased from Go/Western 300 cartons of sprouts shipped on March 20, 1984, and 1,930 cartons of sprouts which it received on April 16, 1984. Respondent claims that it paid Go/Western for the 300 cartons of sprouts, and that it lost money on its resales of the 1,930 carton load.

The evidence is clear that respondent purchased the 300 cartons of sprouts from complainant, not from Go/Western. Complainant has submitted a confirmation of sale and brokers invoice from Go/Western dated March 23, 1984, which shows clearly that complainant was the seller, respondent the buyer, and Go/Western the broker (Finding of Fact 4). Therefore, respondent's admitted acceptance of the 300 cartons of sprouts renders it liable to complainant, the seller, for the entire contract price. Respondent alleges that it has paid for the sprouts, and the report of investigation indicates that respondent did pay \$1,500.00 to Go/Western for 300 cartons of sprouts on August 17, 1984. However, since such payment was made after the March 23, 1984, confirmation was issued, respond-

ent, at the time of the payment, knew or should have known that complainant was the seller. Thus, respondent's payment to the broker had no effect on its liability to complainant for the entire \$2,595.00 contract price for the 300 cartons of sprouts.

Regarding the 1,930 cartons of sprouts, respondent's insistence that it purchased them from Go/Western is contradicted by its own submission of Go/Western's May 4, 1984, confirmation of sale, showing complainant as the seller and respondent as the buyer, with Go/Western acting as the broker (Finding of Fact 8). As respondent does not deny accepting these sprouts when they arrived at its place of business on April 16, 1984, respondent became liable for the f.o.b. contract price therefor, less damages resulting from any breach of warranty, which respondent bears the burden of proving by a preponderance of the evidence. *Farm Market Service Inc. v. Albertson's, Inc.*, 42 Agric. Dec. 429 (1983). Respondent has presented no evidence of any breach of warranty and is thus liable for the contract price for the 1,930 cartons of sprouts.

However, we cannot agree with complainant's assertion that the contract price for the 1,930 cartons was \$13,128.50, as the May 4, 1984, confirmation of sale indicates that the applicable terms were P/A, or price arrival. In a price arrival sale, the price is subject to an agreement between the buyer and seller upon the arrival of the produce at the buyer's destination. 7 CFR 46.43(cc). As no price was apparently agreed to here, we accept the market price for 25 pound cartons of brussels sprouts in New York on the date of arrival, April 16, 1984, as representing the price to which the parties would have agreed. *John Livacich Produce, Inc. v. Ben Gatz Co.*, 33 Agric. Dec. 1155 (1974). The applicable Market News Service Reports show a price of \$7.00 to \$8.00. Using the lower figure, we arrive at a market price of \$13,510.00, for which respondent is liable.

Although complainant claims that it sold and shipped 295 cartons of brussels sprouts to respondent on April 19, 1984, there is evidence that the load was never delivered to respondent. Complainant's invoice and manifest show that on approximately April 19, 1984, the 295 cartons of sprouts were loaded on a Pathfinder truck for delivery to respondent. The report of investigation contains a November 8, 1984, letter from a Fred Kendel, Director of Transportation for complainant, to Veg-A-Mix, Castroville, California, in which Mr. Kendel admits that the 295 cartons were delivered to Veg-A-Mix, instead of respondent (Finding of Fact 11). The report of investigation also contains an October 26, 1984, letter to the Department, in which Mr. Kendel admits that the Pathfinder trucking company does not deliver to the eastern United States (Finding of Fact 10). Complainant contends that on June 5, 1984,

Mr. Kendel discussed this lot with respondent, and respondent did not mention having failed to receive it. However, the record does not contain any statement by Mr. Kendel that this alleged discussion ever occurred. Further, Mr. Kendel's phone records state that the respondent said with respect to the 295 carton lot only that it would "research [its] records." It is the seller's burden to prove that the produce was received and accepted by the buyer, and it is our view that complainant has failed to sustain this burden with respect to the 295 carton load.

We have determined that respondent is liable to complainant for \$2,595.00 for the 300 carton load, and \$13,510.00 for the 1,500 carton load, for a total of \$15,105.00. Respondent's failure to pay this sum is a violation of section 2 of the Act, for which reparation should be awarded, with interest.

ORDER

Within 30 days from the date of this order, respondent shall pay to complainant, as reparation, \$15,105.00, with interest thereon at the rate of 13 percent per annum from May 1, 1984, until paid.

Copies of this order shall be served upon the parties.

VAL-MEX FRUIT CO. INC., *v.* KALECK DISTRIBUTING CO. PAMA
Docket No. 2-6811. Decided March 10, 1986.

Accepted—Noted of Breach—Not timely—Accounting—Inadequate to show
damages—Settlement—Failure to prove—Decision and Order.

Respondent's acceptance of a mixed load of cantaloupes and pineapples made it liable to complainant for the purchase price less any damages resulting from any breach by complainant. Although the amount of decay shown by inspection indicated a breach by complainant respondent was found to have failed to give timely notice of the breach. In addition respondent's accounting of the resale of the goods was inadequate to show respondent's damages. Respondent also failed to establish that a settlement agreement was entered into by the parties.

George S. Whitten, Presiding Officer.

For complainant, *pro se*.

E. G. Hall, McAllen, Texas, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks an award of

reparation against respondent in the amount of \$3,454.02 in connection with the shipment in interstate commerce of one truckload of mixed produce.

A copy of the Report of Investigation made by the Department was served upon the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto denying liability to complainant.

The amount claimed in the formal complaint does not exceed \$15,000.00, and the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 CFR § 47.20) is applicable. Pursuant to this procedure the verified pleadings of the parties are considered a part of the evidence in the case, as is the Department's report of investigation. In addition, the parties were given an opportunity to file evidence in the form of sworn statements, however, neither party did so. Neither party filed a brief.

FINDINGS OF FACT

1. Complainant, Val-Mex Fruit Company, Inc., is a corporation whose address is P.O. Box 1178, Hidalgo, Texas.

2. Respondent, Louis Kaleck, is an individual doing business as Kaleck Distributing Company, whose address is P.O. Box 1432, McAllen, Texas. At the time of the transaction involved herein respondent was licensed under the Act.

3. On or about February 13, 1984, complainant sold to responder one truckload containing 816 crates of various sizes of cantaloupe and 100 cartons of pineapples for a total invoice price of \$13,165.50 f.o.b. Hidalgo, Texas. The invoice price included \$22.50 for a Ryan temperature recorder.

4. Complainant shipped the mixed load of cantaloupes and pineapples to respondent's customer, Gullo Produce Company, Inc., in Pittsburgh, Pennsylvania, on February 13, 1984. Respondent's customer accepted the load after arrival, and on February 16, 1984, at 7:05 a.m., the 816 crates of cantaloupes were federally inspected in the warehouse of respondent's customer. The inspection showed temperatures in various containers to range from 36 to 40 degrees Fahrenheit, and condition to be as follows:

Mostly firm, some ripe and firm. From 1 to 4 melons, (3 to 27%) in most crates many none, average 6% decay, Cladosporium Rot, early stages.

5. On March 15, 1984, respondent paid complainant \$9,139.80 for the mixed load of produce, and on March 17, 1984, respondent paid complainant an additional \$571.68 for the produce. There remains due to complainant a balance of \$3,454.02.

6. An informal complaint was filed on May 1, 1984, which was within nine months after the cause of action herein accrued.

CONCLUSIONS

Complainant seeks to recover the balance of the purchase price of a mixed load of cantaloupes and pineapples sold to respondent and shipped to respondent's customer in Pittsburgh, Pennsylvania from Hidalgo, Texas. Respondent accepted the load of produce by unloading the truck on arrival, and is, therefore, liable to complainant for the full purchase price thereof less any damages shown by any breach of contract proven by respondent.

The federal inspection of the cantaloupes taken on February 16, 1984, in Pittsburgh shows an average of 6% decay which is in excess of what we allow for good delivery. See *G. & S. Produce Co. Inc. v. Schnunk Distributing Co., Inc.*, 34 Agric. Dec. 1604 (1975). In addition, respondent alleges that complainant breached the contract of sale by not shipping fresh cantaloupes and by failing to ship U.S. No. 1 cantaloupes. However, it is not necessary for us to discuss these issues in view of the fact that complainant has alleged that respondent failed to give timely notice of any breach of contract, and respondent has not replied to this allegation. Apparently the first notice given by respondent to complainant that there was any problem with the load was when payment was made to complainant on March 15, 1984, in the reduced amount of \$9,139.80. The Uniform Commercial Code Section 2-607(3) provides in relevant part that:

Where a tender has been accepted the buyer must within a reasonable time after he discovers or should have discovered any breach notify the seller of breach or be barred from any remedy; . . .

We find that respondent is barred from any remedy for any breach by complainant by reason of respondent's failure to give timely notice. See *Produce Specialists v. Gulfport Tomatoes*, 42 Agric. Dec. 1194 (1938); and *Rio-Ray Citrus Corp. v. Joy Citrus*, 31 Agric. Dec. 794 (1972).

In addition we note that even had respondent established that it had given timely notice to complainant of a breach of contract the accounting submitted by respondent from its customer, Gullo Produce Company, Inc., in Pittsburgh, Pennsylvania, is inadequate as a basis for proving damages in that it is not dated and does not give a breakdown of the prices received for individual sales of the produce. The accounting merely gives an average price for each

ze of the cantaloupes and for the pineapples. See *Sunkist Growers v. Fishman Produce*, 41 Agric. Dec. 137 (1982).

Respondent also contends that it entered into a final settlement with complainant for an additional payment of \$571.68 which it paid to complainant on March 17, 1984. Complainant denies this allegation, and we deem it highly significant, and determinative of the issue, that the check stub which accompanied the \$571.68 payment from respondent merely stated "ADDITIONAL PAYMENT ON YOUR INV. # \$50543 OUR INV. # 1971" If the payment was tendered in full settlement there should have been a statement to that effect accompanying respondent's check.

On the basis of all the evidence herein we conclude that there remains due and owing from respondent to complainant the sum of \$3,454.02. Respondent's failure to pay complainant such amount is a violation of section 2 of the Act for which reparation should be awarded to complainant with interest.

ORDER

Within thirty days from the date of this order, respondent shall pay to complainant, as reparation, \$3,454.02 with interest thereon at the rate of 13% per annum from March 1, 1984, until paid.

Copies of this order will be served upon the parties.

RICHARD S. BROWN, INC., v. SLOAN'S SUPERMARKETS, INC. PACA
Docket No. 2-6822. Decided March 10, 1986.

Acceptance by partial unloading—Burden of proof upon respondent—Breach of warranty—Respondent failed to prove—Decision.

Respondent accepted the lettuce by partially unloading it, but failed to sustain its burden of proving a breach of warranty by complainant. Therefore, respondent is liable for the unpaid contract price and its counterclaim, based on the alleged breach, is without merit.

Andrew Stanton, Presiding Officer.

Thomas R. Oliveri, Newport Beach, California, for complainant.
or respondent, *pro se*.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A preliminary complaint was filed in which complainant seeks a repara-

tion award against respondent in the amount of \$3,198.00 in connection with the sale and shipment to respondent of a truckload of lettuce in interstate commerce.

A copy of the report of investigation prepared by the Department was served upon each of the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto, denying liability, and also asserted a counterclaim in connection with the subject matter of the complaint. Complainant filed a reply to the counterclaim, denying liability.

Since the amount claimed as damages does not exceed \$15,000.00, the shortened procedure provided in section 47.20 of the Rules of Practice (7 CFR 47.20) is applicable. Pursuant to such procedure, the report of investigation is considered to be part of the evidence, as are the verified complaint and answer. The parties were given an opportunity to submit additional evidence in the form of verified statements and to file briefs. Complainant submitted an opening statement, respondent submitted an answering statement, and complainant submitted a statement in reply. Complainant also filed a brief.

FINDINGS OF FACT

1. Complainant, Richard S. Brown, Inc., is a corporation whose address is P.O. Box 4729, 635 South Sanborn Road, Suite 13, Salinas, California. At the time of the transaction alleged in the counterclaim, complainant was licensed under the Act.

2. Respondent, Sloan's Supermarkets, Inc., is a corporation whose address is 2 Bennett Avenue, New York, New York. At the time of the transaction alleged in the complaint, respondent was licensed under the Act.

3. On approximately May 8, 1984, complainant sold to respondent, through a broker, Panorama Produce Sales, Inc., Fort Lee, New Jersey, 870 cartons of lettuce, at \$3.00 per carton, plus \$.65 per carton cooling and \$22.50 for a temperature recorder, for a total f.o.b. contract price of \$3,198.00.

4. Complainant shipped the lettuce, in interstate commerce, to respondent. A bill of lading was prepared which indicated that the pulp temperature of the lettuce, when loaded, was 36°F, and a temperature range of 34°F to 36°F was to be maintained in transit. The lettuce arrived at respondent's place of business on approximately May 14, 1984. Upon arrival, respondent unloaded and disposed of approximately 100 cartons. Respondent then requested a federal inspection, which took place on May 15, 1984, at 8:15 a.m. The inspection found as follows, in relevant part:

VARIOUS CONTAINERS Range 44 To 50°F

* * * * *

Applicant States: 775 cartons

Quality: Grade defects average 2% mechanical damage.

Condition: Wrapper leaves: Average 3% decay. Head leaves: Average 2% damage by Tipburn. Average 2% damage by Rib Discoloration. Average 2% damage by bruising. 2 to 3 decayed heads in ½ of cartons, none in remainder, average 6% decay. Decay is Bacterial Soft Rot in various stages.

REMARKS Inspection restricted to 30 cartons being unloaded and 4 stacks nearest rear doors.

5. After receiving the inspection results, respondent notified Jeff Nagelberg, an employee of the broker, who contacted complainant and informed complainant. Complainant did not grant protection or authorize an allowance, but indicated that it would honor any damages respondent sustained due to any breach of contract by complainant. Thereafter, on May 15, 1984, complainant sent the following telegram to respondent: "WILL CONFIRM CONVERSATION WITH MR NAGELBERG 8 AM 5/15/84 AS DISCUSSED YOUR FIRM HAS BEEN GRANTED NO PROTECTION OR AUTHORIZATION FOR ANY ALLOWANCE. HOWEVER RICHARD S BROWN INC WILL HONOR ANY DAMAGES YOU SUSTAIN DUE TO BREACH OF CONTRACT."

6. On May 16, 1984, respondent resold 772 cartons of the lettuce that it purchased from complainant to Square Produce Co., Inc., Bronx, New York, for \$2,430.00.

7. Sometime in July 1984, complainant received a copy of the inspection taken on May 15, 1984. Complainant then sent the following telegram to the broker:

UPON RECEIPT OF COPY OF INSPECTION SHOWING INSPECTION RESTRICTED TO 30 CARTONS AND 4 STACKS NEAREST REAR DOOR AND RANGE OF TEMPERATURES 44 to 50 DEGREES, RICHARD S BROWN INCORPORATED TAKES THE POSITION THAT SUITABLE SHIPPING CONDITION WAS BREACHED IN TRANSIT. RICHARD S BROWN REQUIRES PAYMENT OF SAID INVOICE IN FULL.

8. Respondent has failed to pay any part of the contract price to complainant, and complainant has failed to make any payment to respondent for the load of lettuce.

9. A formal complaint was filed on November 23, 1984, which was within nine months from when the cause of action herein accrued. Respondent filed a timely counterclaim on March 6, 1986, in connection with the subject matter of the complaint.

CONCLUSIONS

Respondent denies accepting the load of lettuce. However, respondent admits unloading and selling approximately 100 cartons when the load arrived at its place of business. Respondent's partial unloading of the lettuce constituted acceptance of the entire load *Mario Saikhon v. Russell-Ward Company, Inc.*, 34 Agric. Dec. 1910 (1975).

Respondent contends that complainant agreed to honor any damages it sustained as a result of a breach of contract by complainant. Respondent asserts that the May 15, 1984, inspection demonstrated that complainant breached its warranty of suitable shipping condition (7 CFR 46.43(j)) and respondent is thus not liable to complainant. We cannot agree. Having accepted the lettuce, respondent became liable for the agreed upon contract price, less any damages resulting from a breach of warranty by complainant, and it is respondent's burden to prove the breach and resulting damages by a preponderance of the evidence. *Stonoca Farms Corporation v. S & S Produce Inc.*, 42 Agric. Dec. 937 (1983). The May 15, 1984, federal inspection shows that the lettuce exhibited a total of 15% condition defects, including 6% decay. This is 1% in excess of the maximum decay allowed for lettuce of this type to meet the good delivery standards set forth in the Department's regulations. (7 CFR 46.44a(2)). The inspection also revealed that the pulp temperatures were quite high, from 44 to 50°F. Further, the inspection was restricted to 30 cartons being unloaded and four stacks near the doors. These high pulp temperatures and the small number of cartons inspected cause us to question the accuracy of the inspection results as representative of the actual condition of the lettuce when it arrived at respondent's place of business. Respondent argues that the high pulp temperatures resulted from local custom and practice, which dictates that vans be left open while awaiting federal inspection because of the shortage of inspectors. Respondent also asserts that the limited number of cartons inspected should not be a factor, as the inspector was not instructed to so limit his inspection. However, these arguments are immaterial, as the only question with which we are concerned is the accuracy of the inspection

results, and not the circumstances that caused the allegedly inaccurate results to occur. Therefore, it is our conclusion that respondent has failed to sustain its burden of proving any breach of warranty by complainant.

Having failed to prove a breach of warranty by complainant, respondent is liable for the entire contract price of \$3,198.00, and its failure to pay this sum to complainant is a violation of section 2 of the Act, for which reparation should be awarded with interest. Further, as respondent has failed to prove any breach by complainant, its counterclaim is without merit and must be dismissed.

ORDER

Within 30 days from the date of this order, respondent shall pay to complainant, as reparation, \$3,198.00, with interest thereon at the rate of 13% per annum from June 1, 1984, until paid.

Respondent's counterclaim is hereby dismissed.

Copies of this order shall be served upon the parties.

INTERNATIONAL A.G. INC., v. MACK C. DEMPSEY d/b/a MACK DEMPSEY CO. PACA Docket No. 2-7073. Decided March 12, 1986.

Order issued by Donald A. Campbell, Judicial Officer.

ORDER REQUIRING PAYMENT OF UNDISPUTED AMOUNT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed on November 7, 1985. Complainant seeks to recover \$6,234.64, which amount is alleged to be the total purchase price for melons sold to and accepted by respondent on or about January 17, 1986. Respondent filed an answer to the formal complaint on December 24, 1985, admitting that \$3,340.50 of the amount claimed by complainant was due and owing to complainant on account of the transaction involved herein.

Section 7(a) of the Act (7 U.S.C. § 499g(a)) provides, in part:

If after the respondent has filed his answer to the complaint, it appears therein that the respondent has admitted liability for a portion of the amount claimed in the complaint as damages, the Secretary . . . may issue an order directing the respondent to pay the complainant the undisputed amount . . . leaving the respondent's liability for the undisputed amount for subsequent determination.

Accordingly, under the authority of the above quoted section, respondent shall pay to complainant, as an undisputed amount, \$3,340.50. Payment of this amount shall be made within 30 days from the date of this order with interest thereon at the rate of 13 percent per annum from February 1, 1986, until paid. A failure to pay this amount within 30 days will constitute a violation of section 2 of the Act, 7 U.S.C. § 499b.

Respondent's liability for payment of the disputed amount is left for subsequent determination in the same manner and under the same procedure as if an order for the payment of the undisputed amount had been issued.

Copies of this order shall be served upon the parties.

TOP QUALITY FRUIT & PRODUCE DISTRIBUTORS, INC., v. VOLLMER
PRODUCE, INC. PACA Docket No. 2-7077. Decided March 12,
1986.

Order issued by Donald A. Campbell, Judicial Officer.

ORDER REQUIRING PAYMENT OF UNDISPUTED AMOUNT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed on September 12, 1985. Complainant seeks to recover \$4,793.95, which amount is alleged to be the total purchase price for mixed produce sold to and accepted by respondent between August 8 and September 29, 1984. Respondent filed an answer to the formal complaint on December 26, 1985, admitting that \$2,630.60 of the amount claimed by complainant was due and owing to complainant on account of the transaction involved herein.

Section 7(a) of the Act (7 U.S.C. § 499g(a)) provides, in part:

If after the respondent has filed his answer to the complaint, it appears therein that the respondent has admitted liability for a portion of the amount claimed in the complaint as damages, the Secretary . . . may issue an order directing the respondent to pay the complainant the undisputed amount . . . leaving the respondent's liability for the undisputed amount for subsequent determination.

Accordingly, under the authority of the above quoted section, respondent shall pay to complainant, as an undisputed amount, \$2,630.60. Payment of this amount shall be made within 30 days

from the date of this order with interest thereon at the rate of 13 percent per annum from November 1, 1984, until paid. A failure to pay this amount within 30 days will constitute a violation of section 2 of the Act, 7 U.S.C. § 499b.

Respondent's liability for payment of the disputed amount is left for subsequent determination in the same manner and under the same procedure as if an order for the payment of the undisputed amount had been issued.

Copies of this order shall be served upon the parties.

H. HALL & CO. INC., v. ACTION PRODUCE. PACA Docket No. 2-6546.
Decided March 14, 1986.

Failure to deliver produce on schedule—Reparation.

Respondent failed to deliver two loads of lettuce on schedule and complainant was consequently unable to meet his commitments for an advertised sale. From calculations made, it was judged that complainant's total damages amounted to \$6460 for respondent's failure to deliver. However, complainant sought only the \$5620 of its customers alleged cover purchases. Thus, respondent's liability to complainant restricted to that amount, i.e. \$5620, plus 13% interest.

George S. Whitten, Presiding Officer.

for complainant, pro se.

for respondent, pro se.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks an award of reparation in the amount of \$5,620.00 against respondent in connection with a contract for the sale of two truckloads of lettuce in interstate commerce.

A copy of the report of investigation prepared by the Department was served upon each of the parties. A copy of the formal complaint was served upon respondent which filed an answer thereto denying liability to complainant.

Since the amount of damages claimed in the complaint did not exceed \$15,000, the shortened method of procedure provided in the Rules of Practice (7 CFR § 47.20) is applicable. Under this procedure, the verified pleadings of the parties are considered as part of the evidence, as is the Department's report of investigation. In ad-

dition the parties were given the opportunity to submit further evidence in the form of verified statements. Complainant submitted an opening statement, respondent submitted an answering statement, and complainant submitted a statement in reply. Neither party filed a brief.

FINDINGS OF FACT

1. Complainant H. Hall and Co., Inc., is a corporation whose address is P.O. Box 5125, Salinas, California.

2. Respondent, Action Produce, is a partnership composed of Davis Packing Co., Pat H. Hodges, John Kai, and Rala Singh, whose address is P.O. Box 1712, Glendale, Arizona. At the time of the transactions involved herein this respondent was licensed under the Act.

3. On or about August 4, 1983, respondent contracted to sell to complainant one truckload of lettuce for shipment on August 6, 1983, from Center, Colorado, to complainant's customer at Jamaica, Long Island, New York. The agreed f.o.b. price of the lettuce was \$4.00 per carton, plus 70¢ per carton vacuum cooling, and \$3.00 per carton for freight. On the same day, respondent agreed to sell to complainant an additional truckload of lettuce for shipment on August 8, to the same destination, for an f.o.b. price of \$5.00 per carton, plus 70¢ per carton for vacuum cooling, and \$3.00 per carton for freight.

4. Respondent did not harvest or ship lettuce on August 6, because of rain and so notified complainant at 8:00 a.m. on the morning of August 6, 1983. The lettuce which was scheduled to be shipped on August 8, was also not shipped due to mechanical difficulty with the truck on which it was to be shipped. Complainant was not notified until the morning of August 9, 1983, that the shipment scheduled for August 8, had not been made, and at that time complainant informed respondent that it was too late for any lettuce to be shipped since arrival would not be in time for the previously advertised sale scheduled by complainant's customer for Thursday, August 11, 1983.

5. The formal complaint was filed on February 14, 1984, which was within nine months after the causes of action herein accrued.

CONCLUSIONS

The parties agree that the lettuce which was scheduled for shipment on August 6, 1983, was not shipped by respondent due to weather conditions. However, complainant claims that this did not excuse respondent from its failure to ship the lettuce.

The parties are in disagreement over whether respondent stood ready to make the shipment scheduled for August 8, 1983, in a timely fashion. Respondent claims that it was ready to make shipment on August 8, but states that complainant gave notice on the morning of August 8, that shipment should not be made. Complainant disputes this contention, and instead maintains that respondent failed to ship on August 8, because of mechanical difficulty with the truck on which shipment was scheduled to be made. Complainant asserts that when complainant called respondent on the morning of August 9, 1983, complainant found out for the first time that a shipment had not been made on August 8. Complainant states that it was on the morning on August 9, 1983, that respondent gave the excuse that there had been mechanical difficulty with the truck. Complainant maintains that at this time it informed respondent that it was too late for any shipment of lettuce to be made. We have found that complainant's version of the events relative to the second load of lettuce is supported by a preponderance of the evidence.

We have long held that, in the absence of express conditions which are made a part of the contract, weather and transportation difficulties do not furnish an excuse for failure to ship, unless it is known and agreed ahead of time that the produce which is the subject of the contract is to come from a specific acreage. See *Christensen Bros. v. Hecht Produce Company*, 17 Agric. Dec. 473 (1958). It is clear that Section 2-615 of the Uniform Commercial Code, which relates to excuse by failure of presupposed conditions, was intended to embody the existing law in this regard. Official comment 9 to section 2-615 states in relevant part that:

The case of a farmer who has contracted to sell crops to be grown on designated land may be regarded as falling either within the section on casualty to identified goods in this section, and he may be excused, when there is a failure of the specific crop. . . .

In the absence of a specific understanding between the parties that the produce is to come from a specified tract of land, a shipper can protect himself by simply specifying as a condition of the contract that shipment will be made "weather permitting" or some similar language. The shipper could also have made availability of transportation a condition as to time of shipment. As we stated in *Christensen Bros. v. Hecht Produce Company, supra*;

Under the contract, it was respondent's duty to go into the open market if necessary and obtain the cabbage to enable him to fulfill his part of the contract. Respondent

says there was no Arizona cabbage available and he was therefore prevented from obtaining cabbage to fulfill the contract. This contention is without merit. The contract did not specify Arizona cabbage. If complainant could obtain a replacement load of cabbage, obviously respondent could have obtained cabbage with which to fill the contract.

In this case complainant states that its customer purchased lettuce to cover the contract. This was certainly permissible under the circumstances of this case. However, the only documentation which complainant furnished of the cover purchase was an invoice to complainant from its customer for the difference in price between its customer's purchase cost and contract cost for the lettuce. This is not sufficient documentation for the cover purchase. In addition there was no explanation as to why the cover purchase was effectuated in Philadelphia rather than on the New York market.

The Uniform Commercial Code § 2-711 provides in relevant part that where the seller fails to make delivery or repudiates the buyer may either cover "or . . . recover damages for non-delivery" as provided in section 2-713. Accordingly, we will attempt to assess damages for non-delivery. Section 2-713 of the U.C.C. states that "the measure of damages for non-delivery or repudiation by the seller is the difference between the market price at the time when the buyer learned of the breach and the contract price together with any incidental and consequential damages provided in this Article (Section 2-715), but less expenses saved in consequence of the seller's breach." This is not an anticipatory repudiation case (see *V. V. Vogel & Sons Farms, Inc. v. Continental Farms, Inc.*, (PACA Docket 2-6191, decided March 21, 1985), 44 Agric. Dec. (1985)), and the "time when the buyer learned of the breach" must be interpreted as the time when complainant learned that shipment had not been made as scheduled, or the mornings of Aug. 6 and 9, 1983. See *White & Summers*, Uniform Commercial Code, § 6-4, and § 6-7 at p. 199 (1972). Section 2-713 of the U.C.C. further provides that in cases of non-delivery or repudiation by the seller "[m]arket price is to be determined as of the place for tender or, in cases of rejection after arrival or revocation of acceptance, as of the place of arrival." The place for tender in a f.o.b. shipping point contract is at shipping point. See *White and Summers*, Uniform Commercial Code, § 6-4, p. 184-188 (1972). See also *Globe Products Co. v. Laurence Frozen Foods* 19 Agric. Dec. 125 (1960); *Pearce-Young & Angel Co. v. Turlock*, 18 Agric. Dec. 43 (1959); and *Western Fruit Co. v. Turlock Frozen Foods*, 17 Agric. Dec. 780 (1958). However, Comment No. 1 to U.C.C. section 2-713 states that the prices to be

used in calculating damages should come from "the market in which the buyer would have obtained cover had he sought that relief." On this basis, where cover was unobtainable the shipping point market, we have used destination market prices as the basis for computing damages. *Bliss Produce Co. v. A.E. Albert & Sons*, 35 Agric. Dec. 742 (1976).

As to the first load complainant had time to obtain cover in the shipping area and still meet its customer's requirements in a timely manner. However, complainant stated that it immediately attempted to book another load in the shipping area and was unable to do so at any price. This was not rebutted by respondent. Under the circumstances it is appropriate that we look to the destination market for the computation of damages for this load. As to the second load, when complainant learned of the breach on August 9, 1983, there was not sufficient time left to seek cover on the shipping point market and still meet the scheduled delivery time. Consequently we will also look to the destination market in order to compute damages for the second load.

There were no quotations for Colorado lettuce for New York City during the applicable period. The closest market for which quotations are available is Philadelphia, and the first date during the applicable period with Colorado lettuce quotations on the Philadelphia market is August 10, 1983. See U.C.C. section 2-723(a). The Market News Service report for Philadelphia on that date shows Colorado lettuce quoted at \$12 to \$13. Respondent's shipping schedule for the period in question showed shipments containing from 748 to 908 cartons with an average of 850 cartons. Using this latter figure for the two loads, and subtracting the respective contract price plus freight of \$7.70 for the first load, and \$8.70 for the second load, from the lower Market News Service reported price of \$12.00, gives us \$6,460.00 as complainant's total damages for respondent's failure to deliver. Since complainant requested only the \$5,620 cost of its customer's alleged cover purchases, complainant's recovery should be restricted to such amount. Respondent's failure to pay complainant the sum of \$5,620 is a violation of section 2 of the Act for which reparation should be awarded to complainant with interest.

ORDER

Within 30 days from the date of this order, respondent shall pay to complainant as reparation, \$5,620, with interest thereon at the rate of 13 percent per annum from September 1, 1983, until paid.

Copies of this order shall be served upon the parties.

THE KATZ COMPANY, INC. v. THE KUNKEL CO. INC. PACA Docket
No. 2-6647. Decided March 14, 1986.

Acceptance of potato load with rot—not occurable over shipment period—
Respondent meets burden of proof—Finding for respondent.

Respondent's customer accepted a shipment of potatoes bought from complainant. Respondent subsequently, on advice from customer, informed complainant that there was substantial mahogany rot in consignment, as verified by federal inspection. It was held that this was a condition that could not have occurred during the shipment period. Respondent tendered a check for \$1600 for the damaged consignment, having subtracted a \$2721 loss from the invoice price. Complainant refused that payment, demanding the entire invoice amount. Our analysis held complainant must bear the loss resulting from the poor condition of the potatoes. Thus, respondent was directed to pay complainant the \$1600 originally tendered, plus 13 per cent interest per annum until paid.

Ben Bruner, Presiding Officer

Bennett C. Katz, Plover, Wisconsin, for complainant.

Ken Komer, Hopkins, Minnesota, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This case was brought pursuant to the reparation provisions of the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award in the amount of \$4,820.80, in connection with a shipment of potatoes in interstate commerce.

A copy of the report of investigation prepared by the Department of Agriculture was served upon each party. A copy of the formal complaint was served upon respondent which filed an answer thereto denying liability. As the amount claimed in the complaint does not exceed \$15,000.00, the shortened method of procedure provided for in the Rules of Practice is applicable (7 CFR § 47.20). Pursuant to this procedure, the verified pleadings of the parties are considered part of the evidence, as is the Department's report of investigation. The parties were given the opportunity to file additional evidence in the form of verified statements. Neither party did so. Although given an opportunity to do so, neither party filed a brief.

FINDINGS OF FACT

1. Complainant, the Katz Company, Inc., is a corporation whose address is P. O. Box 708, Plover, Wisconsin 54467.

2. Respondent, the Kunkel Company, Inc., is a corporation whose address is Room 105, 1301 Cambridge Street, Hopkins, Minnesota 55343.

3. On March 8, 1984, the parties entered into an oral contract whereby respondent purchased 440 sacks of U.S. No. 1A potatoes, 100 pounds per sack at a price of \$9.82 per cwt. delivered to Albert Lea, Minnesota.

4. Complainant shipped 440 sacks of potatoes to Mrs. Gerry's Kitchen, Inc. on March 9, 1984, and such potatoes arrived at the delivery point on March 12, 1984. Respondent's customer accepted the shipment on March 12, 1984.

5. Respondent notified complainant on March 14, 1984, that an internal defect identified as "mahogany rot" had been discovered in the shipment of potatoes. Respondent also requested a federal inspection of the potatoes on that date.

6. On March 15, 1984, at 1:40 p.m., a federal inspection was made of the potatoes which showed, in relevant part, as follows:

CONDITION OF LOAD: Stacked on pallets in warehouse.

CONDITION OF PACK: XXX

TEMPERATURE OF PRODUCT: In various sacks 37° to 52°F.

SIZE: Generally 1½ to 3½ inches, mostly 2 to 3 inches in diameter. Average 3% under 1½ inches.

QUALITY: Fairly clean to clean; mature; generally fairly well to well formed. External grade defects from 2 to 8%, average 4%, mostly old bruises and misshapen.

CONDITION: Firm. From 2 to 10% per sample, average 7% damage by sunken discolored areas with underlying flesh gray to black. From 2 to 16% per sample, average 11% serious damage by Internal Mahogany Browning. No soft rot.

GRADE: Fails to grade U.S. No. 1 account total [sic] grade defects including 11% Internal Mahogany Browning.

7. Mrs. Gerry's Kitchen, Inc., had to dispose of many of the potatoes because they were unusable. That business also expended extra labor resulting in more costs in processing the shipment. As a result, respondent suffered losses totalling \$2,720.80.

8. Respondent tendered a check in the amount of \$1,600.00 in payment for the load of potatoes. This amount was arrived at by subtracting the loss suffered by respondent (\$2,720.80) from the invoice price (\$4,320.80). Such payment was refused by complainant, which demanded the entire invoice amount.

9. The informal complaint was filed on May 4, 1984. The formal complaint was filed on July 23, 1984. These filings were within nine months after the cause of action alleged herein occurred.

CONCLUSIONS

There are two issues in this case. The first issued is whether there was an inordinate delay between acceptance of the potatoes by the purchaser and notification of breach to the seller. A second issue is whether the mahogany rot occurred prior to acceptance, in which case complainant must bear responsibility, or after acceptance, in which case respondent is responsible. Based upon our analysis of the facts and the law, we find the complainant must bear the loss resulting from the poor condition of the potatoes.

There are two circumstances in which the delay in notification could cause respondent to bear the loss resulting from the poor condition of the potatoes. First, the amount of time passing between acceptance of the shipment and notification of breach to the seller could be so unfair to complainant that it would be inequitable to grant respondent a remedy for breach. The rule of law regarding notification time limits provides that "[w]here a tender has been accepted, (a) the buyer must within a reasonable time after he discovered or should have discovered any breach notify the seller of breach or be barred from any remedy. . . ." U.C.C. § 2-607, See also *Smith v. Fischer*, 16 Agric. Dec. 1008, 1011 (1957); *Quality Potato Co. v. Cooney & Korschack*, 13 Agric. Dec. 1104 (1954). Applying this authority to the facts of this case, the issue may be stated as whether respondent discovered the breach and reported it to complainant within a reasonable time after acceptance.

Complainant maintains that respondent should have immediately inspected the potatoes at the time of delivery, and therefore, discovered the breach before or immediately following acceptance. Respondent argues that the defect was internal, and therefore, not discoverable unless the potatoes were cut open. Since mahogany rot is an internal defect, in order to detect it, potato purchasers would have to slice the potatoes open for a proper inspection. If the potatoes are to be processed within a relatively short time, as in the instant case, it is reasonable to wait until processing before cutting the potatoes, unless the buyer has notice of a potential internal defect. There is no evidence presented that would indicate the re-

spondent should have been alerted to the possibility of mahogany rot occurring in the load of potatoes it received prior to receipt.

The second issue is whether the potatoes conformed to the specifications agreed to by the parties at the time of acceptance. We do not believe that they did. Nowhere does complainant offer any evidence that the potatoes did not have mahogany rot at the time of processing—two days after acceptance. The only question is whether the rot could have occurred during the two-day period.

Having accepted the potatoes, respondent bears the burden of proof on this issue. See, U.C.C. § 2-607(4); *Roy Rucker Produce v. J. P. Miller Wholesale Produce*, 33 Agric. Dec. 871, 873 (1974). Respondent argues that mahogany rot is a condition that occurs in potatoes over a period of time longer than two days. In support of its position, respondent cites USDA Market Bulletin # 479 which provides that mahogany browning is a defect "caused by lengthy storage at too cold a temperature, generally three months or more." While the language cited by respondent is not specific, we conclude that it would be an extraordinary and unlikely occurrence for mahogany rot to occur over a two-day period in potatoes.

Since complainant does not dispute either the condition of the potatoes at the time respondent had them inspected or the results of that inspection, and since mahogany rot is not produced in normal circumstances over a two-day period, we hold that respondent has met its burden of proof. We, therefore, find for the respondent.

As set forth in Finding of Fact No. 8 *supra*, respondent tendered, and complainant refused to accept, a check in the amount of \$1,600.00 in payment for the potatoes. Complainant does not dispute the amount of loss suffered by respondent (\$2,720.80), therefore; it is held that respondent owes complainant \$1,600.00, for which reparation shall be awarded. A valid tender was made thereby precluding an award of interest to complainant from the date of the transaction. *Salinas Marketing Cooperative v. Leonard O'Day Company*, 16 Agric. Dec. 719, 725 (1957). Respondent shall remit \$1,600.00 to complainant. Its failure to pay this amount as ordered herein will constitute a violation of section 2 of the Act.

ORDER

Within 30 days from the date of this order, respondent shall pay to complainant as reparation, \$1,600.00, with interest at the rate of 13 percent per annum from the first day of the month beginning after the date of this order.

Copies of this order shall be served upon the parties.

YATES BROS. PRODUCE v. NORMAN M. COFFIN, INC. PACA Docket
No. 2-6786. Decided March 14, 1986.

Evidence—invoices—damages.

Complainant showed through invoices that respondent had not paid for beans it had purchased, but rather had paid for other transactions. Complainant was entitled to receive full sales price.

Peter V. Tram, Presiding Officer.

For complainant, *pro se*.

Michael Styles, Fort Lauderdale, Florida, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*), hereinafter referred to as the Act. A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of \$3,894.00 in connection with the sale of mixed vegetables in interstate commerce.

A copy of the formal complaint and a copy of the Department's report of investigation were served upon respondent. A copy of the report of investigation was served upon complainant.

Respondent filed an answer in which it denied liability asserting that it had been billed twice for the same produce.

Since the amount claimed in damages does not exceed \$15,000.00, the shortened procedure provided for in section 47.20 of the Rules of Practice (7 CFR § 47.20) applies. Pursuant to such procedure, the parties were given an opportunity to submit additional evidence in the form of verified statements. Complainant declined to file an opening statement. Respondent's proposed Answering Statement was not timely filed and was therefore not accepted. Both parties declined an opportunity to file briefs.

References to Exhibits refer to the exhibits made a part of the report of investigation compiled by Department officials.

FINDINGS OF FACT

1. Complainant Yates Bros. Produce, hereinafter referred to as the complainant, is a trade name of Yates Bros. Farm, Inc. Complainant's mailing address is P.O. Box 249, Morven, Georgia 31638.

2. Respondent Norman M. Coffin, Inc., hereinafter referred to as respondent, is a corporation whose mailing address is State Farmers Market, Administration Building, Office No. 26, Pompano Beach, Florida 33060.

3. Both parties are, and at all times material herein were, licensed with the Secretary of Agriculture to do business under the Act.

4. Between November 5, 1983, and November 9, 1983, complainant sold to respondent eight truckloads of mixed vegetables. The invoice numbers were 5421, 5432, 5442, 5452, 5467, 5438, 5462, 5469 and totalled \$8,284.00.

5. Respondent paid \$4,390 on September 11, 1984, in full payment of invoices 5421, 5469, 5438 and 5442.

6. Respondent has not paid for invoices 5432, 5452, 5462, and 5467 totalling \$3,894.00.

7. The formal complaint was filed on December 11, 1984. An informal complaint was filed on June 18, 1984, which was within nine months after the cause of action herein accrued.

CONCLUSIONS

This case involves a dispute over whether respondent ever received the goods complainant purportedly shipped. Respondent claims that it was double billed twice for the same shipment of goods. An examination of the trucking records and invoices in question, however, shows that there were eight different, albeit in some cases similar, shipments.

Exhibit 1a of the report of investigation is invoice 5438 and the delivery ticket showing that on November 5, 1983, complainant shipped to respondent 250 hampers of snap beans, 60 hampers of wax beans and 50 hampers of pole beans. The trucker was Steve Herr. Respondent claims that this transaction was the same shipment as was billed on November 8, 1983, as invoice number 5467. An examination of that invoice and delivery ticket which appear as exhibit 1g of the report of investigation shows that the delivery ticket was signed by a Joe Matosis not Steve Herr. Additionally, there is no mention on #5467 of the shipment of any wax beans and there were only 240 hampers of green beans shipped not 250 as in invoice 5438. It is clear, therefore, that these are two separate transactions.

Comparing invoices 5421 and 5432 which are very close in price, \$600 and \$612, respectively, show that they, too, relate to separate shipments. Invoice 5421 (Exhibit 1f) shows that 100 hampers of snap beans and 25 hampers of wax beans were shipped to an A. Vissalo and that the trucker was named Demby. Invoice 5432 (Ex-

hibit 1c) makes no mention of wax beans, is for 102 hampers of snap beans and indicates that the produce was shipped to Patterson, N.J. by a Joey Tucker. These invoices refer to different loads, different destinations and different truckers. They are, therefore, clearly separate transactions.

Invoices 5462 and 5452 are for similar amounts but are once again shipped by different truckers and are for different loads. Invoice 5462 (Exhibit 1e) shows that Monroe Gibbs was the trucker who delivered 100 cartons of fancy green squash or zucchini, 100 cartons of medium green squash or zucchini and 22 hampers of snap beans and that the total invoice price was \$732.00. Invoice 5452 (Exhibit 1d) shows an entirely different load consisting of 60 hampers of snap beans, 10 hampers of wax, 20 hampers of pole beans and 40 hampers of fancy green squash for a total invoice price of \$760.00. The trucker was designated as Paul T. These are clearly different transactions.

The last disputed set of shipments refer to invoices 5469 and 5442. These are clearly different transactions. Invoice 5469 (Exhibit 1h) was for only \$500.00 and covered the shipment of 50 hampers of pole beans and 50 cartons of fresh green squash via Associated Trucking. Invoice 5442, (Exhibit 1b) on the other hand, was for \$1440.00 covering the shipment of 200 hampers of snap beans, 20 hampers of pole beans and 10 hampers of wax beans via Eagle Trucking. These two transactions involve different loads shipped via different truckers.

Respondent's defense that it had already paid for the transactions because it had, in essence, been double-billed is without merit. We find that complainant did ship the produce indicated by the eight invoices, and that respondent has only paid for four the transactions and still owes \$3,894.00.

Complainant is entitled to receive the value of the goods shipped which is measured by the contract price of \$8,284.00 less \$4,390.00 already paid, or \$3,894.00. Respondent's failure to pay that amount is a violation of section 2 of the Act for which reparation should be awarded with interest.

ORDER

Within 30 days from the date of this order, respondent shall pay to complainant as reparation, \$3,894.00, with interest thereon at the rate of 13 percent per annum from December 1, 1983, until paid.

Copies of this Order shall be served upon the parties.

**ADAMS BROTHERS PRODUCE COMPANY, INC., v. MEAT DISTRIBUTORS,
INC. PACA Docket No. 2-7089. Decided March 14, 1986.**

Dennis Becker, Presiding Officer

Pro se, for complainant.

Irving Silver, Alabama, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

REPARATION ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of \$30,604.00 in connection with shipments of mixed produce in interstate commerce. A copy of the formal complaint was served upon respondent, which filed an answer thereto, admitting the material allegations of the complaint, including the indebtedness claimed by complainant. Accordingly the issuance of an order without further procedure is appropriate, pursuant to section 47.8(d) of the Rules of Practice (CFR 47.8(d)).

Complainant, Adams Brothers Produce Co., Inc., is a corporation whose address is P. O. Box 2682, Birmingham, Alabama 35202. Respondent, Meat Distributors, Inc., is a corporation whose address is P. O. Box 9608, Mobile, Alabama 36691. At the time of the transaction involved herein, respondent was licensed under the Act.

The facts alleged in the formal complaint are hereby adopted as findings of fact of this order. On the basis of these facts, we conclude that the actions of respondent are in violation of section 2 of the Act (7 U.S.C. 499b) and have resulted in damages to complainant of \$30,604.00. Accordingly, within 30 days from the date of this order, respondent shall pay to complainant, as reparation, \$30,604.00, with interest thereon at the rate of 13 percent per annum from September 1, 1985, until paid.

Copies of this order shall be served upon the parties.

SUN VALLEY PACKING COMPANY v. PETE GUINTA d/b/a TOP OF THE
HILL PRODUCE and/or LLOYD MYERS Co. INC. PACA Docket No.
2-6378. Decided March 18, 1986.

Complainant a proper party—change of contract terms to consignment—complainant liable for loss incurred in handling consigned lot—apparent authority of broker—buyer stopped from denying—breach of broker's duties—award of fees and expenses to complainant.

Complainant found to be the proper party to file the complaint. Respondent buyer sustained his burden of proving that the contract terms were changed to a consignment on one of the three lots of produce involved. Complainant liable for buyer's loss incurred in handling consigned lot. Where buyer had given the respondent broker authority to order produce in his name and terminated the grant of authority without notifying the produce industry, buyer is estopped from denying the apparent authority of the broker to purchase the other two lots from complainant. Buyer liable for the purchase price of the two lots. Broker breached its brokers duties with respect to the two lots, but incurred no liability because of the wording of the complainant. Fees and expenses awarded to complainant.

Andrew Stanton, Presiding Officer.

Thomas R. Oliver, Newport Beach, California, for complainant.

Robert Lawler, DeWitt, New York, for respondent

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent Pete Guinta, d/b/a Top of The Hill Produce or, if such respondent is not found to be liable, respondent Lloyd Myers Co., Inc., in the amount of \$23,936.80 in connection with three loads of lettuce allegedly sold and shipped to respondent Pete Guinta, d/b/a Top of The Hill Produce, in interstate commerce.

A copy of the report of investigation prepared by the Department was served upon each of the parties. A copy of the formal complaint was served upon each respondent. Respondent Lloyd Myers Co., Inc. filed an answer, denying liability. Respondent Pete Guinta, d/b/a Top of The Hill Produce, initially failed to file an answer and was held in default but, after its motion to reopen the hearing was granted, it filed an answer denying liability and asserting a counterclaim for \$727.82.

The amount claimed as damages exceeds \$15,000 and an oral hearing was requested. Therefore, an oral hearing took place on May 7, 1985, at Syracuse, New York. At the hearing, one witness

testified for complainant, one witness testified for respondent Pete Guinta, d/b/a Top of The Hill Produce, and one witness testified for respondent Lloyd Myers Co., Inc. Evidence was introduced by the Presiding Officer as well as by all three parties. Pursuant to section 47.7 of the Rules of Practice (7 CFR § 47.7) the report of investigation prepared by the Department is also considered part of the evidence. The parties were given an opportunity to file briefs and claims for fees and expenses. Complainant and respondent Pete Guinta, d/b/a Top of the Hill Produce filed briefs. Complainant also filed a claim for fees and expenses.

FINDINGS OF FACT

1. Complainant, Sun Valley Packing Company, is a partnership whose address is P.O. Box 869, Blythe, California. At the time of the transaction involved in the counterclaim, complainant was licensed under the Act.

2. Respondent, Pete Guinta, d/b/a Top of The Hill Produce (hereinafter, "Guinta") is an individual whose address is 2100 Park Street, Syracuse, New York. At the times of the transactions involved herein in the complaint, Guinta was licensed under the Act.

3. Respondent, Lloyd Myers Co., Inc. (hereinafter, "Myers"), is a corporation whose address is 23742 Rotunda Road, P.O. Box 55818, Valencia, California. At the times of the transactions involved herein in the complaint, Myers was licensed under the Act.

4. In early March 1982, Guinta and Myers entered into an agreement providing that Guinta would accept billing on certain invoices for produce purchased on his behalf by Myers but shipped to another buyer. When Myers received payment from the buyer, it would issue a check payable to Guinta, at which time Guinta would pay the original invoice. The agreement did not provide that Myers would purchase the produce from Guinta, or that Myers was not obligated to pay Guinta until Myers received payment from the third party buyer. Guinta set forth the provisions of this arrangement in an August 9, 1983, letter to the Department, which was placed into evidence by the Presiding Officer at the oral hearing. Complainant was never notified of the existence of this arrangement. Several loads of produce were purchased by Myers and billed to Guinta pursuant to this arrangement. Towards the end of March 1982, Guinta may have informed Myers that it was terminating the agreement, but complainant was never notified of this.

5. On approximately March 29, 1982 and April 1, 1982, complainant's agent, Dave Garcia, sold to Guinta, through Myers acting as the broker, two truckloads of lettuce. The March 29, 1982 load consisted of 794 cartons of 2½ dozen Nunn Brand lettuce at \$12.00 per

carton plus \$.65 per carton cooling and \$22.50 for a Ryan recorder for a total contract price of \$10,066.60, f.o.b. The April 1, 1982, load consisted of 825 cartons of 2½ dozen Sir Jason Brand lettuce at \$12.00 per carton plus \$.65 per carton cooling and \$22.50 for a Ryan recorder, for a total contract price of \$10,458.75, f.o.b. Complainant loaded the lettuce onto trucks, and prepared a bill of lading showing the destination as Guinta at Syracuse, New York. However, both loads of lettuce were diverted by Myers to a receiver in Kansas City, Missouri. Neither Guinta nor complainant were notified of the diversion. Guinta did not learn of the purchases by Myers on his behalf until shortly after they were made, when it received complainant's invoices.

6. Soon after arranging the March 29, 1982, transaction, Myers issued and sent to complainant and Guinta a confirmation of sale noting that the seller was High & Mighty Farms, Blythe, California, and the price terms were \$7.00 per carton plus \$.65 per carton cooling. The confirmation did not mention that the lettuce was to be diverted to Kansas City, Missouri.

7. Complainant was never paid for the March 29 and April 1, 1982, loads.

8. On approximately April 6, 1982, complainant sold to Guinta, through Myers acting as the broker, 513 cartons of Sir Jason Brand lettuce at \$6.00 per carton, plus \$.65 per carton cooling, for a total contract price of \$3,411.45, f.o.b.

9. The April 6, 1982, load of lettuce was shipped to Guinta, along with produce from another shipper, and arrived on approximately April 12, 1982. Upon receipt of the load, Pete Guinta wrote on the bill of lading that only 507 cartons were present. The load was then federally inspected, which resulted as follows, in relevant part:

Products Inspected:	Iceberg Type LETTUCE in cartons branded: . . . "SIR JASON, LET- TUCE 2½ DOZ. HEADS, SUNVAL- LEY PACKING CO., BLYTHE, CA."
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Applicant states: 513 cartons Sir Jason
Brand . . .

Condition of Pack:	<i>EACH LOT:</i> Stacked at above location on pallets, in cooler. <i>EACH LOT:</i> Some cartons are crushed in at vari- ous locations, from 1 to 2 inches.
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Condition of Pack:	<i>EACH LOT:</i> Mostly fairly tight, some slack 1 to 2 inches, . . .
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Sir Jason Lot: Range 29.50 pounds to 43.00 pounds, average 37.07 pounds net weight per carton.

TEMPERATURE OF PRODUCT: Range 37 to 39°F.

Quality: *EACH LOT:* Heads or portions of heads not affected by condition defects are fresh and crisp.

Condition *J.I.K LOT: WRAPPER LEAVES:* Range 5 to 18 heads per carton, average 36% damage by yellow leaves. Range 1 to 4 heads per carton, average 10% Bacterial Soft Rot, in various stages, affecting wrapper leaves only. *HEAD LEAVES:* Range 2 to 6 heads per carton, average 12% damage by yellow leaves. Range 1 to 3 heads per carton, average 7% Bacterial Soft Rot, in various stages, affecting 1 to 4 outer leaves.

10. After the inspection, Guinta notified Myers of the condition problems, and Myers contacted complainant, which agreed to allow Guinta to handle the April 6 load on consignment. Myers then issued a confirmation of sale on April 14, 1982, reflecting this change in the contract terms.

11. Guinta resold the lettuce of the April 6 load and prepared an account of sales, which he sent to complainant. The account of sales reads as follows:

Sun Valley Packing Company
Post Office Box 869
Blythe, California 92226

Account of sales: Received only 507

7 at \$7.00-	49.00
15 at 5.00-	75.00
71 at 4.00-	284.00
10 at 3.00-	30.00
250 at 2.00-	500.00
22 at 2.00 cash	44.00
132 dumped	<u> </u>
	\$982.00

507 boxes times \$3.14 per box freight, handling and comm.

\$1,591 98	freight
117 84	handling and commission
<hr/>	
1,709 82	
982.00	gross return
<hr/>	
727.82	owed to us

12. Complainant was never paid for the April 6, 1982, shipment.

13. Complainant has never paid Guinta the \$727.82 which Guinta claims to be due and owing for the April 6, 1982, shipment.

14. An informal complaint was filed by complainant on December 30, 1982, which was within nine months from when the alleged causes of action herein accrued. A formal complaint was filed on June 17, 1983.

15. Guinta originally failed to file an answer and was held in default. However, Guinta's motion to reopen was granted and Guinta filed an answer on February 24, 1984, in which he asserted a counterclaim in connection with the subject matter of the complaint.

CONCLUSIONS

The first issue which must be resolved is whether the complainant is the proper party to bring the complaint filed herein. Both respondents deny that the three loads of lettuce at issue were purchased from complainant. Myers claims that the purchases were made from Dave Garcia, selling for High & Mighty Farms, Blythe, California. The record contains confirmations of sale issued by Myers for the March 29, 1982, and April 6, 1982, loads which indicate that High & Mighty Farms, not complainant, was the seller. However, Dave Garcia testified (Tr. at 11, 12, 16, 17) that the three loads of lettuce sold to Guinta through Myers were from a small lot owned by complainant. Guinta admits receiving complainant's invoices for the loads. In addition, an April 12, 1982, inspection taken on the April 6 load when it arrived at Guinta's place of business shows that the lettuce originated from complainant (Finding of Fact 9). Further, Guinta sent his account of sales to complainant (Finding of Fact 11). Therefore, while Myers may not have been aware of complainant's involvement, it is apparent that Guinta was well aware that complainant was the seller of the three loads of lettuce.

We will next discuss the April 6, 1982, shipment, which was admittedly received by Guinta. Guinta claims that when the truck ar-

nived, it contained only 507 cartons, not the 513 cartons it had ordered. The record contains a bill of lading on which Pete Guinta wrote that only 507 cartons were received (Finding of Fact 10). Although the April 12, 1982, federal inspection says that the applicant, Guinta, asserted that 513 cartons were present at that time, we believe the writing on the bill of lading is more convincing evidence of the number of cartons actually received by Guinta.

Guinta also claims that the 507 cartons were severely deteriorated upon arrival, and this is borne out by an April 12, 1982, inspection report (Finding of Fact 9). Guinta contends that the contract terms were changed to a consignment. Complainant denies this, but the record contains a confirmation of sale issued by the broker reflecting this change (Finding of Fact 10). The burden is on the party asserting a change in the contract terms to prove such a change by a preponderance of the evidence (*American Banana Co. Inc. v. Marvin Gray*, 41 Agric. Dec. 539 (1982)), and it is our view that Guinta has sustained his burden of proof in this regard. Guinta has submitted an account of sales, which shows that only \$982.00 was received on resale. This is a reasonable figure considering the severe deterioration shown by the lettuce upon its arrival. In his account of sales, Guinta claims that after deducting freight and handling, complainant owes him \$727.82. We conclude that Guinta's claim is valid, and find that complainant is liable for \$727.82 in connection with the April 6, 1982, shipment. The complainant alleges that if Guinta is not found to be liable, Myers should be liable for failing to properly perform its broker's duties. However, we do not perceive any breach of duty by Myers with respect to this transaction.

Guinta claims it never ordered or received the March 29, 1982, and April 1, 1982, loads of lettuce. Myers contends that it had an arrangement with Guinta whereby Myers would order the produce on behalf of Guinta and then purchase it from him. Myers would then send the produce to a third party. Myers claims that it was only obligated to pay Guinta if it received payment for the loads from the third party to whom the loads eventually were shipped, and since it did not receive such payment, it had no obligation to pay Guinta. Guinta agrees to having arranged with Myers for Myers to order produce in Guinta's name, with the understanding that the produce would be shipped elsewhere. However, Guinta does not agree that Myers bought such produce from him for shipment to a third party, or that Myers had no obligation to pay him until Myers received payment by the third party. In addition, Guinta claims that it ended this arrangement towards the end of March 1982, shortly before the two transactions at issue occurred.

Guinta's version of this arrangement with Myers is set forth in his August 9, 1983, letter to the Department (Finding of Fact 4), and we believe it accurately describes the arrangement.

Respondents do not allege that complainant was ever notified of the arrangement between them, and admit having failed to pay complainant for the two loads of lettuce. The question to be resolved is which respondent is liable for the lettuce. A similar situation was presented in *George Arakelian Farms, Inc. v. Leonard O'Day Co. and/or O-K Distributors*, 31 Agric. Dec. 1395 (1972). In that case, the respondents claimed that they had agreed to a business arrangement allegedly prompted by O-K's recordkeeping problems. For a limited period of time, O-K would order produce on behalf of O'Day. O-K would sell the produce to third parties, collect the purchase price, and remit it to O'Day. O'Day would then use these funds to pay the produce sellers. According to the respondents, the purchases at issue in that case were made by O-K after its arrangement with O'Day had terminated. Therefore, the respondents contended that O-K rather than O'Day was liable. The Judicial Officer found O'Day to be solely liable, stating (at 1401) as follows:

By placing Kirchberg [O-K] in a position of having apparent authority to act for him, O'Day thus became liable to complainant notwithstanding his alleged lack of actual authority. In situations such as this where a principal by any act or conduct knowingly causes or permits another to appear as his agent, either generally or for a particular purpose, he will be estopped to deny such agency.

The Judicial Officer went on to note (at 1404) that no notice was ever given to the perishable agricultural commodities industry that this arrangement had ever been terminated and O-K no longer had authority to make purchases for O'Day. Similarly, in this case, by permitting Myers to order produce in Guinta's name, for which Guinta was to be billed, and failing to notify the perishable agricultural commodities industry that this arrangement was no longer in effect, Guinta is now estopped from denying that Myers was no longer acting as his agent at the time it made the two purchases at issue. Therefore, Guinta must be held liable for the full purchase price of the two loads in the amounts of \$10,066.60 and \$10,478.75, totalling \$20,525.35.

Myers' conduct as a broker was certainly in breach of its broker's duties set forth in section 46.28 of the regulations (7 CFR § 46.28), as it did not fully inform complainant that Guinta was not going to be receiving the March 30 and April 1, 1982, loads, and did

not prepare memoranda of sale stating truthfully who was going to be receiving them. As reprehensible as Myers' conduct was, it cannot be held liable, as complainant has alleged that Myers is liable only if Guinta is found not to be.

We have determined that Guinta is liable to complainant for the contract prices of the two loads it purchased, through Myers, in the amount of \$20,525.35, less the \$727.82 lost by Guinta as a result of the consigned load, or \$19,797.53. Guinta's failure to pay complainant this amount is a violation of section 2 of the Act, for which reparation should be awarded, with interest.

Complainant, as the prevailing party, is entitled to reasonable fees and expenses in connection with the oral hearing. Complainant has submitted a claim for such fees and expenses in the amount of \$4,367.17. Complainant's claim is reasonable, and will be awarded in full.

ORDER

Within 30 days from the date of this order, respondent Pete Guinta, d/b/a Top of The Hill Produce, shall pay to complainant \$19,797.53, with interest thereon at the rate of 13% per annum from May 1, 1982, until paid.

Within 30 days from the date of this order, respondent Pete Guinta, d/b/a Top of The Hill Produce, shall pay to complainant, as reparation for fees and expenses, \$4,367.17, with interest thereon at the rate of 13% per annum from the date of this order, until paid.

The complaint against respondent Lloyd Myers Co., Inc. is dismissed.

Copies of this order shall be served upon the parties.

TRI PRODUCE, INC., v. GIANT FOOD, INC. PACA Docket No. 2-6812.
Decided March 18, 1986.

Rejection without reasonable cause—transportation conditions abnormal—resale would have been futile—after buyer rejects, seller may retain possession.

Respondent rejected the cantaloupes without reasonable cause and held liable for the contract price, as the warranty of suitable shipping condition was voided by the existence of abnormal transportation conditions, evidenced by the freezing damage affecting the melons upon arrival at respondent's place of business. Complainant was not required to resell the melons because such an effort would have been futile. Complainant was not obligated to turn the melons over to respondent for resale after respondent's rejection.

Andrew Stanton, Presiding Officer.

Tri For complainant, *pro se*.

Arthur D. Koch, Washington, D.C. for respondent

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of \$5,062.50 in connection with the sale and shipment of a truckload of cantaloupes to respondent in interstate commerce.

A copy of the report of investigation prepared by the Department was served upon each of the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto, denying liability.

Since the amount claimed as damages does not exceed \$15,000.00 the shortened procedure provided in section 47.20 of the Rules of Practice (7 CFR § 47.20) is applicable. Pursuant to such procedure, the report of investigation prepared by the Department is considered part of the evidence, as are the verified complaint and answer. The parties were given an opportunity to submit additional evidence in the form of verified statements and to file briefs. Respondent submitted an answering statement and complainant submitted a statement in reply. Respondent also filed a brief.

FINDINGS OF FACT

1. Complainant, Tri Produce Co., is a corporation whose address is 1795 North Fine Avenue, Fresno, California.
2. Respondent, Giant Food, Inc., is a corporation whose address is P.O. Box 1441, Washington, D. C. At the time of the transaction involved herein, respondent was licensed under the Act.
3. On approximately August 31, 1984, complainant sold to respondent a truckload of size 15 cantaloupes consisting of 1,050 cartons at a price of \$4.00 per carton, plus \$.55 per carton precooling, \$.25 per carton palletizing, and \$22.50 for a temperature recorder, for a total contract price of \$5,062.50, f.o.b. The contract did not specify that the cantaloupes were to be U.S. number one.
4. On August 31, 1984, complainant shipped the truckload of cantaloupes in interstate commerce to respondent, where it arrived on September 7, 1984, and was federally inspected. The inspection revealed as follows, in pertinent part:

VARIOUS CONTAINERS Range 35 To 38° F.

CANTALOUPE IN CARTONS: "Tri Brand 15, Ca."

Many top layer cartons and some 6th layer cartons show from one to two melons adjacent to sides or top of cartons being glassy and translucent following freezing injury up to ¼ inch in depth.

Remainder of Stock: Quality: Grade defects average 2% scars and misshapen.

Condition: Mostly ripe and firm, many firm. Mostly turning yellow, some green. 1 to 3 melons in most cartons, none in some, average 9% damage by bruising, generally affecting ripe and firm melons and located at bottoms or sides of cartons. Average 2% damage by sunken areas, affecting ripe and firm melons. Less than 1% decay.

GRADE: Meets quality requirement but fails to grade U.S. No. 1 only account of condition.

REMARKS Restricted 10 pallets being unloaded and 4 pallets nearest rear doors.

5. After the inspection, respondent refused to unload the melons, and indicated to the truck driver that it was rejecting the load. Complainant was notified and instructed the truck broker to dispose of the cantaloupes. The truck broker, on September 7, 1984, sent the following telegram to respondent:

MAX SHAPIRO [respondent] IS REJECTING CANTALOUPE THAT MADE GOOD DELIVERY PER BOB STOCKTON OF TRI PRODUCE THE TEMPERATURES ON ARRIVAL WERE 35 TO 38 DEGREES USDA INSPECTION SHOWS 14 PERCENT CONDITION DEFECT ALAMO TRUCK BROKERS IS SELLING MELONS FOR SHAPIRO ACCOUNT WILL DEDUCT FREIGHT OF \$2,800 PLUS \$250 TO HAUL LOAD TO RICHMOND VIRGINIA AND WILL REMIT REMAINDER TO TRI PRODUCE.

Complainant subsequently called the truck broker and told him that if it should receive any net proceeds from its resale of the cantaloupes, those proceeds should be turned over to respondent, not complainant.

6. The truck broker disposed of the cantaloupes and remitted no proceeds to respondent.

7. A formal complaint was filed on March 6, 1985, which was within nine months from when the cause of action herein accrued.

CONCLUSIONS

Complainant contends that respondent rejected the cantaloupes without reasonable cause and is thus liable for the \$5,062.50 contract price. Respondent argues that the condition of the cantaloupes upon arrival at its place of business was poor and justified their rejection. Respondent also claims that complainant deprived respondent of the ability to resell the cantaloupes after rejection by instructing the truck broker to take possession of the load and resell it in Richmond, Virginia.

Complainant, as the party alleging that respondent rejected the cantaloupes without reasonable cause, has the burden of proving its own compliance with the terms of its contract with respondent. *Tom Bengard Ranch, Inc. a/t/a Keen Harvest v. Prevor-Mayrsohn International, Inc.*, 40 Agric. Dec. 1781 (1981). As this was an f.o.b. contract, complainant gave an implied warranty of suitable shipping condition, "that the commodity, at the time of billing, is in a condition which, if the shipment is handled under normal transportation service and conditions, will assure delivery without abnormal deterioration at the contract destination agreed upon between the parties." 7 CFR 46.43(j). Accordingly, in the absence of normal transportation conditions, the suitable shipping condition warranty is inapplicable.

The September 7, 1984, federal inspection indicates that many cartons of the load suffered severe freezing damage. This damage obviously occurred during transit. Therefore, it is apparent that transportation conditions in this case were abnormal, which voids the suitable shipping condition warranty. We conclude, therefore, that complainant has met its burden of proving its compliance with the terms of its contract, and respondent had no reasonable cause to reject the melons.

Having rejected the cantaloupes without reasonable cause, respondent became liable for the difference between the contract price and the amount realized from complainant's resale, provided the resale was made in good faith and in a commercially reasonable manner. *Byrd Produce Company v. Albany Public Markets, Inc.*, 1 Agric. Dec. 136 (1972); U.C.C. 2-706. The record does not reflect the actual disposition of the melons, but complainant contends in its sworn statement in reply that the trucking company sold them to recover the cost of freight. In order for complainant to be able to recover the contract price under the circumstances present in this case, it must show that it was unable to resell the cantaloupes at a

reasonable price after having made a reasonable effort to do so, or show that such an effort would have been futile. *R.V. Saur & Sons Orchards, Inc. v. Affy Tapple, Inc.*, 42 Agric. Dec. 458 (1983); U.C.C. § 2-709. We can assume from the deterioration and severe freezing damage shown by the September 7, 1984, inspection report that the melons were sufficiently deteriorated that their resale price could not have been in excess of the transportation costs. Therefore, any effort by complainant to resell the melons for a price greater than that obtained by the trucking company would have been futile.

Respondent claims that it was wrongly deprived of possession of the melons and the opportunity to resell them on its own. However, the Uniform Commercial Code, at section 2-703, provides in relevant part that "where the buyer wrongfully rejects . . . the aggrieved seller may . . . (d) resell and recover damages as hereafter provided (section 2-706. . . ." See also *Gwin White & Prince, Inc. v. National Food Corporation*, 42 Agric. Dec. 445 (1983). Therefore, complainant was legally entitled to turn over the melons to the trucking company, and under no obligation to provide them to respondent for resale.

Complainant is entitled to the contract price of \$5,062.50. Respondent's failure to pay this sum to complainant is a violation of section 2 of the Act for which reparation should be awarded, with interest.

ORDER

Within 30 days from the date of this order, respondent shall pay to complainant, as reparation, \$5,062.50, with interest thereon at the rate of 13 percent per annum from October 1, 1984, until paid.

Copies of this order shall be served upon the parties.

ROBERT L. MEYER d/b/a MEYER TOMATOES, v. OTAY PACKING CO
PACA Docket No. 2-6833. Decided March 18, 1986.

Undisputed amount—Order issued—Payment in full of disputed amount.

Respondent admitted liability for 9 of the 10 loads of tomatoes alleged in the complaint, in the amount of \$89,079.50, and an Order Requiring Payment of Undisputed Amount was issued requiring payment of that sum. Respondent's claim that the remaining \$10,868.00 was paid to complainant, supported by evidence that complainant deposited the check, was not disputed by complainant. The complaint for \$10,868.00 was thus dismissed.

Andrew Stanton, Presiding Officer

For complainant, pro se.

For respondent, pro se.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of \$99,947.50 in connection with the sale and shipment of 10 truckloads of tomatoes to respondent in interstate commerce.

A copy of the report of investigation prepared by the Department was served upon each of the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto admitting liability for \$89,079.50, but denying liability for \$10,868.00.

Although the amount claimed as damages is greater than \$15,000.00, the parties waived oral hearing. The shortened procedure provided in section 47.20 of the Rules of Practice (7 CFR 47.20) is, therefore, applicable. Pursuant to such procedure, the report of investigation is considered to be part of the evidence, as are the verified complaint and answer. The parties were given an opportunity to submit additional evidence in the form of verified statements and to file briefs, but chose not to do so.

FINDINGS OF FACT

1. Complainant, Robert L. Meyer d/b/a Meyer Tomatoes, is an individual whose address is P.O. Box 606, King City, California.
2. Respondent, Otay Packing Co., is a corporation whose address is P.O. Box 3247, Chula Vista, California. At the times of the transactions involved herein, respondent was licensed under the Act.
3. On approximately August 28 and 30, September 1, 8, 11, 15, 20, 21, 26, and 28, 1984, complainant sold to respondent 10 truckloads of tomatoes. The contract price for the August 28, 1984, truckload was \$10,868.00, f.o.b. The contract prices for the remaining nine truckloads totaled \$89,079.50, f.o.b. The tomatoes were sold in contemplation of eventual movement in interstate commerce.
4. Respondent received and accepted the tomatoes, but has paid complainant only for the August 28, 1984, load in the amount \$10,868.00; by means of a check which complainant accepted and deposited into his account. Respondent has failed to pay complain-

ant the contract prices for the remaining nine loads of tomatoes in the amount of \$89,079.50.

5. A formal complaint was filed on March 1, 1985, which was within nine months from when the causes of action herein accrued.

6. On May 8, 1985, respondent filed its answer, in which it admitted liability for all but one of the truckloads of tomatoes alleged in the complaint, in the amount of \$89,079.50. Therefore, on June 25, 1985, an Order Requiring Payment of Undisputed Amount was issued against respondent, ordering it to pay to complainant the undisputed amount of \$89,079.50.

CONCLUSIONS

Respondent admits liability for all the transactions alleged in the complaint except for the shipment of tomatoes of August 28, 1984, with a contract price of \$10,868.00, which respondent claims it paid to complainant in a check dated September 28, 1984. Respondent has submitted with its verified answer a copy of the check which shows that it was accepted and deposited by complainant. Complainant has not responded to respondent's allegations of payment. Therefore, we conclude that respondent has fully paid the \$10,868.00 contract price for the August 28, 1984, shipment. As we have already issued an Order Requiring Payment of Undisputed Amount for the remaining \$89,079.50, we conclude that respondent is without any further liability, and the complaint against it must, therefore, be dismissed.

ORDER

The complaint is hereby dismissed.

Copies of this order shall be served upon the parties.

UNIVERSAL FRUIT CO. INC. v. JERRY'S FRUIT & GARDEN CENTER, INC.
PACA Docket No. 2-6692. Decided March 24, 1986.

Produce delivered must be same as that inspected for a "Purchase After Inspection". Parties must specify or clearly act in accordance with a "Purchase After Inspection." A "Purchase After Inspection" makes inapplicable all implied warranties.

Complainant sold 1,056 boxes of strawberries to respondent after respondent made two detailed inspections. Respondent claimed complainant warranted that the uninspected boxes were same quality and condition as those inspected. Complainant denied this. Since respondent accepted the goods after inspection and there was no showing goods were not same as those inspected, reparation was awarded to complainant.

Jory M. Hochberg, Presiding Officer.

LeRoy W. Gudgeon, Northfield, Illinois, for complainant.

David J. Weiss, Chicago, Illinois, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*), hereinafter "PACA." A timely complaint was filed in which complainant seeks an award of reparation against respondent in the amount of \$3,696.00, in connection with the sale to respondent of 1,056 cases of strawberries in interstate commerce.

A copy of the Department's report of investigation was served upon the parties. A copy of the formal complaint was served upon the respondent. Respondent filed an answer denying any liability to complainant. The amount claimed as damages in the formal complaint does not exceed \$15,000.00, and the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 CFR § 47.20) is applicable. Under this procedure, the verified pleadings of the parties are considered part of the evidence, as is the Department's report of investigation. In addition, the parties were given an opportunity to file evidence in the form of sworn statements. Complainant filed opening statements and respondent filed answering statements. Complainant then filed a statement in reply. Neither party filed a brief.

FINDINGS OF FACT

1. Complainant, Universal Fruit Company, Inc., is a corporation whose address is 35 South Water Market, Chicago, Illinois.

2. Respondent, Jerry's Fruit & Garden Center, Inc., is a corporation whose address is 7901 N. Milwaukee Avenue, Niles, Illinois. At the time of the transaction involved herein, respondent was licensed under the Act.

3. On or about May 16, 1984, complainant sold to respondent 1,056 boxes of strawberries, which were all that remained from a load of 2,496 cases of strawberries which had been purchased by complainant, and which had arrived at complainant's place of business from California on May 11, 1984. Respondent had agreed to purchase the 1,056 cases of strawberries at a price of \$3.50 per case following two separate inspections made by respondent's agents on the day of purchase. The strawberries were picked up and delivered by a cartage truck to respondent's store on May 16, 1984.

4. On the morning of May 17, 1984, respondent's buyer phoned complainant's salesman to propose the return of the strawberries on the ground that the quality and condition was unsuitable. Complainant refused to accept the return of the strawberries.

5. The formal complaint was filed on August 13, 1984, which was within nine months after the cause of action alleged herein accrued.

CONCLUSIONS

Complainant seeks to recover the full amount of the purchase price of 1,056 cases of strawberries, alleging that the respondent made a "purchase after inspection" as that term is defined in section 46.43(ff) of the regulations promulgated under the PACA (7 CFR § 46.43(ff)). If a "purchase after inspection" took place, respondent waived all implied warranties of quality or condition. Respondent contends, however, that despite having inspected the strawberries, complainant's agent expressly represented that the uninspected boxes were of the same quality as those inspected. Respondent further contends that upon the arrival of the strawberries it discovered that they were not as represented, and that 65% were offered for sale as canning fruit at \$1.00/case and 35% were unsaleable and, therefore, thrown out.

There were two basic areas of factual dispute. The first concerns whether any express warranties were made at the time of sale. Complainant claims none were made while respondent claims complainant's employee expressly represented that the uninspected boxes were of the same quality as the inspected boxes. The second factual dispute concerns the actions and statements of the parties after the strawberries arrived at respondent's store. Complainant contends that when respondent complained about the quality the following day, complainant agreed to reduce the purchase price \$1.50 per case as a "courtesy." Respondent contends that complainant's salesman acknowledged the unmerchantable condition, and told respondent to sell the strawberries for whatever it could get, and that the parties would later make a settlement. Respondent further states that it informed complainant that it planned to sell the strawberries for \$1.00 per case before actually doing so.

It is complainant's burden to prove by a preponderance of the evidence that the transaction in question was a "purchase after inspection." *Crouse Farms v. Dublin Produce Co.*, 29 Agric. Dec. 1439 (1970). To carry this burden, complainant must show that the goods shipped were the same as the goods inspected, *Kirby & Little v. United Fruit*, 16 Agric. Dec. 1066 (1957), and that the parties used the term "purchase after inspection" or acted in accordance with a

belief that the contract was governed by it, *Ritepak Produce v. Green Grove Markets*, 29 Agric. Dec. 165 (1970). First, there is little or no dispute concerning the identity of the goods. The sworn statement of complainant's salesman states that the strawberries were first offered to respondent's buyer at \$4.00 per case, but were reduced to \$3.50 per case if respondent desired to take all the remaining cases. Neither respondent's buyer, who inspected the strawberries at complainant's facility on two occasions on the day of shipment, nor respondent's owner, who was present during the second inspection, question whether the strawberries delivered were the same as those available for inspection.

The record also supports complainant's contention that the contract was for "purchase after inspection" as that term is defined by section 46.43(ff) of the regulations. Complainant's salesman states in his affidavit that first the respondent's buyer and then the buyer and the owner made two separate inspections on the day in question, and describes in detail the extensive and unrestricted inspections which took place in complainant's cooler. The accomplishment or details of these inspections are not denied by respondent's buyer and owner. Respondent claims, instead, that complainant's salesman expressly represented that the uninspected cases were of like quality and condition. However, this claim is not in conformity with respondent's previous statement that it purchased the produce "under the assumption that it was saleable merchandise." Moreover, respondent does not explain how the circumstances of the alleged representation by complainant's salesman came about, particularly when the two full and complete inspections would tend to make it unnecessary. Finally, respondent offers absolutely no documentary evidence to substantiate its claims that 35% of the strawberries had to be thrown out and 65% had to be sold for canning. Even if this was not a purchase after inspection, the lack of such documentary evidence would tend to undermine respondent's claim of damages as a result of breach of contract.

It has been held that full and complete inspection makes inapplicable all implied warranties. *Max Feldman & Sons v. Alderiso Bros., Inc.*, 27 Agric. Dec. 763 (1968); *Roll Packing v. Bracker*, 18 Agric. Dec. 975 (1959). At times, even "doorway inspections" have been found to form the basis for a purchase after inspection. *Leo & Sons v. Wesco Foods Co.*, 12 Agric. Dec. 188 (1953). The two inspections conducted by respondent herein provide ample support to find a "purchase after inspection," making all implied warranties inapplicable. The evidence further supports a finding that no express warranties were made. Since respondent rejected complainant's offer to settle the dispute by reducing the purchase price \$1.50 per

se, complainant is entitled to the full purchase price of \$3,696.00 originally agreed to by the parties. Respondent's failure to pay is amount is a violation of section 2 of the Act for which reparation should be awarded with interest.

ORDER

Within thirty days from the date of this order, respondent shall pay to complainant, as reparation, \$3,696.00, with interest thereon the rate of 13% per annum, from July 1, 1984, until paid.

Copies of this order shall be served upon the parties.

DENICE AND FILICE PACKING CO., v. CORGAN & SON, INC. PACA
Docket No. 2-6743. Decided March 24, 1986.

burden of proving breach and damages upon respondent—Damages resulting from breach—Respondent failed to prove—Resale of consigned peppers not prompt and proper—Purchase price—Reasonable value of peppers on quantum merit basis.

Respondent made no attempt to justify its failure to pay for three of the five loads of peppers it admittedly received and accepted, it is liable for their contract prices. Regarding one of the remaining loads, while respondent may have proved a breach of warranty by complainant, respondent has failed to sustain its burden of proving damages as it did not provide any evidence of resales. With respect to the other remaining load, although there is evidence to support respondent's allegation that the peppers were consigned, respondent failed to make prompt and proper redress and is liable for the reasonable value on a *quantum meruit* basis. Complainant's damages are limited to the amount sought.

Andrew Stanton, Presiding Officer.

Thomas R. Oliveri, Newport Beach, Calif., for complainant.

For respondent, *pro se*.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of \$12,586.20 in connection with the sale and shipment of five lots of peppers in interstate commerce.

A copy of the report of investigation prepared by the Department was served upon each of the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto denying liability with respect to three of the lots.

Since the amount claimed as damages does not exceed \$8, the shortened procedure provided in section 47.20 of the Practice (7 CFR § 47.20) is applicable. Pursuant to such the report of investigation is considered to be part of the as is the verified complaint. The answer, since it is not, is not considered part of the evidence. The parties were given opportunity to submit additional evidence in the form of statements and to file briefs. Complainant submitted one statement, but respondent elected not to submit any additional evidence. Neither party filed a brief.

FINDINGS OF FACT

1. Complainant, Denice and Filice Packing Co., is a company whose address is 10001 Fairview Road, Hollister, California.

2. Respondent, Corgan & Son Inc., is a corporation whose address is 161-162 N.Y.C. Terminal Market, Bronx, New York, at the times of the transactions alleged herein, respondent was operating under the Act.

3. On approximately July 27, 1984, complainant sold and shipped 80 cartons of large red bell peppers in interstate commerce to Shopwell Stores, Inc., Bronx, New York. Colvin Distribution Company, Millbrae, California, acted as the broker. Upon arrival at receiver's place of business on August 1, 1984, the receiver reported to the broker that the peppers had been inspected and found to have condition defects averaging 25 percent damage by bruising, sunken discolored areas affecting over 1/4 to 1/2 of the surface of the peppers, five to 12 percent, average nine percent damage by decay, and two to seven percent, average four percent damage by decay. The broker reported this to complainant, which then advised respondent to handle the peppers for complainant's account. The parties then agreed that respondent would pay complainant \$7.00 per carton for the peppers, totaling \$560.00, f.o.b. Respondent did not make any payment to complainant for the 80 cartons of peppers.

4. On approximately July 24 and August 2, 7, and 15, 1984, complainant sold and shipped to respondent, in interstate commerce, four lots of peppers for f.o.b. prices of, respectively, \$4,539.30, \$4,343.40, and \$2,743.50. All four loads were accepted by respondent. The price terms for the July 24, 1984, shipment eventually changed to a consignment, but respondent did not pay an account of sales, or any payment. Respondent has not made any payment for the other three lots of peppers as well.

August 21, 1984, respondent secured a federal inspection of the August 15, 1984, shipment. That inspection stated as follows, in part:

Temperature of Product:	Ranges 48 to 50F.
Condition:	Mostly fresh, firm and crisp. Red color 5 to 34%, average 20% damage by shriveling. 13 to 26%, average 18% damage by numerous slightly sunken discolored areas. Decay ranges 2 to 9%, average 6% Gray Mold Rot and/or Bacterial Soft Rot in various stages affecting walls and calyxes.

Respondent did not resell any peppers from the August 15, 1984, shipment.

A formal complaint was filed on December 24, 1984, which was nine months from when the causes of action herein accrued.

CONCLUSIONS

Respondent does not deny receiving and accepting the five loads in issue, but claims in its unverified answer that three loads were abnormally deteriorated upon arrival at its place of business. Having accepted the five loads, respondent became bound to pay the agreed upon contract prices, less any damages resulting from any breach of warranty by complainant. Respondent has failed to prove the breach and damages by a preponderance of the evidence. *Magic Valley Produce, Inc. v. Art Kramer's Produce Service, Inc.*, 39 Agric. Dec. 464 (1980).

Respondent admits that the August 15, 1984, load of peppers was deteriorated upon arrival at respondent's place of business. The federal inspection report contained in the report of investigation confirms this (Finding of Fact 5). However, complainant claims respondent refused to negotiate any settlement and has no record of an accounting on the shipment. The record does not contain any evidence of resales by respondent on the August 15, 1984, load. Therefore, we conclude that while there might have been a breach of warranty by complainant on this load, respondent failed to sustain its burden of proving any damages resulting from such breach. Therefore, respondent is liable for the full cost of \$2,743.50.

Respondent does not allege in its unsworn answer that there is any problem with the July 27, 1984, load, the report of

investigation contains a letter from the broker, who states that it received notice from respondent on August 1, 1984, that the July 27, 1984, load had condition problems when it arrived at the place of business of the original receiver, Shopwell Stores Inc., Bronx, New York. The broker claims that the peppers were sent to respondent to handle for complainant's account. In its opening statement, complainant does not agree that the peppers were consigned, but claims that respondent agreed to accept them at a fixed price of \$7.00 per carton, or \$560.00 for the load. Even if the peppers were consigned to respondent, respondent had the duty to promptly and properly resell them, render an accounting to complainant, and pay over to complainant the net proceeds after deducting its necessary expenses incurred in the resale. *Stoops & Wilson, Inc. v. Wholesale Produce Exchange*, 41 Agric. Dec. 290 (1982). Respondent has not provided any evidence of resales, and has made no payment at all to complainant for this load. Therefore, we conclude that even if respondent accepted the peppers on consignment, it breached its duty to complainant and is liable for the reasonable value of the peppers on a *quantum meruit* basis. *Grady Pruett v. E. Vega & Sons Produce*, 41 Agric. Dec. 1196 (1982). In the absence of any other evidence as to the reasonable value of the peppers, we take judicial notice of the Bronx, New York, Market News Service Reports for August 1, 1984, which shows a price of \$25.00 per carton for the type of peppers involved herein, or \$2,000.00 for all 80 cartons. However, this exceeds the \$560.00 requested by complainant, and we conclude that respondent is liable for this lesser sum only.

With respect to the three remaining loads of peppers at issue, those sold on July 24, August 2, and August 7, 1984, respondent has not presented any evidence whatsoever to justify its failure to pay complainant the agreed upon contract prices. Therefore, we find respondent to be liable for the full amount claimed in the complaint for all five shipments, totaling \$12,586.20. Respondent's failure to pay complainant this sum is a violation of section 2 of the Act, for which reparation should be awarded, with interest.

ORDER

Within 30 days from the date of this order, respondent shall pay complainant, as reparation, \$12,586.20, with interest thereon at a rate of 13 percent per annum from September 1, 1984, until paid.

Copies of this order shall be served upon the parties.

BLESSINGS IN ACRES v. ROBERT W. THURSTON d/b/a THURSTON MARKETING Co. PACA Docket No. 2-6843. Decided March 24, 1986.

Contract terms—Specific F.O.B. price agreed to—Contract terms not changed—Burden of proof as to breach and damages upon respondent—Breach of suitable shipping condition warranty—Damages incurred by respondent exceed contract price.

It was determined that the parties agreed to a specific F.O.B. contract price, and the price terms were not changed after the truckload of strawberries arrived at respondent's place of business. Respondent sustained his burden of proving a breach of complainant's suitable shipping condition warranty. The damages incurred by respondent exceeded the contract price. Therefore, the complaint was dismissed.

Andrew Stanton, Presiding Officer.

For complainant, pro se.

For respondent, pro se.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of \$3,154.80 in connection with the sale of a truckload of strawberries shipped in interstate commerce.

A copy of the report of investigation prepared by the Department was served upon each of the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto, denying liability.

Since the amount claimed as damages does not exceed \$15,000.00, the shortened procedure provided in section 47.20 of the Rules of Practice (7 CFR § 47.20) is applicable. Pursuant to such procedure, the report of investigation is considered part of the evidence, as are the verified complaint and answer. The parties were given an opportunity to submit additional evidence in the form of verified statements and to file briefs. Complainant submitted an opening statement, respondent submitted an answering statement, and complainant submitted a statement in reply. Respondent also filed a brief.

FINDINGS OF FACT

1. Complainant, Blessings In Acres, is a partnership whose address is P.O. Box 355, Soledad, California.

2. Respondent, Robert W. Thurston d/b/a Thurston Marketing Co., is an individual whose address is P.O. Box 1903, Bakersfield,

California. At the time of the transaction involved herein, respondent was licensed under the Act.

3. On approximately June 16, 1984, complainant sold to respondent a truckload of strawberries consisting of 1,128 flats, U.S. number one, at the price of \$6.00 per flat, plus \$.60 per flat for cooling and \$222.00 for tectrol, for a total of \$7,666.80, f.o.b.

4. The truckload of strawberries was shipped, in interstate commerce, to respondent's customer, Kleiman & Hochberg, Inc., Bronx, New York, where it arrived at approximately 8:00 a.m. on June 21, 1984. The temperature recorder shows that a temperature of approximately 35° was maintained throughout transit.

5. The truckload of strawberries was federally inspected at 4:45 a.m. on June 22, 1984, and revealed as follows, in relevant part:

VARIOUS CONTAINERS	Range 42° To 45°F
STRAWBERRIES:	California Strawberries "Blessings In Acres Co."
Applicant States:	1,000 flats.
Quality:	Grade defects average 3% misshapen.
Condition:	Mostly ripe and firm, mostly fairly bright, some dull. [Unintelligible] fresh and green 15 to 35% average 22% ripe and soft, many which are leaking Decay ranges 12 to 28% average 20% Gray Mold Rot in various stages, some of which in [unintelligible]

6. Respondent received \$2,820.00 from its resale of the strawberries to Kleiman & Hochberg, Inc., which sum it remitted to complainant as the undisputed amount owing. Respondent has not made any additional payment to complainant for the strawberries in issue.

7. In a letter to the Department dated October 8, 1984, respondent's owner, Robert W. Thurston, Jr., states as follows, in pertinent part, concerning the load of strawberries at issue:

We purchased these berries, if you can call it a purchase, based on an FOB price of \$6.00, but the terms of the purchase were FOB as to price, delivered as to terms, U.S. 1 grade and excellent quality on arrival.

8. A formal complaint was filed on February 25, 1985, which was within nine months from when the alleged cause of action herein accrued.

CONCLUSIONS

The first issue which must be resolved is the parties' dispute over the agreed upon contract price. Complainant asserts that respondent agreed to an f.o.b. price of \$6.00 per flat, plus cooling and tectrol. Respondent maintains that the price was to be determined after arrival because respondent's Mr. Thurston had no prior knowledge of the shipper or label. The report of investigation contains a letter dated October 8, 1984, from Mr. Thurston to the Department in which he admits that he purchased the strawberries based on an f.o.b. price of \$6.00 (Finding of Fact 7). Therefore, we conclude that a specific contract price was agreed to by the parties, in the amount claimed by complainant.

Respondent admits receiving and accepting the strawberries, but claims they were extremely deteriorated and, when complainant was advised of this, complainant agreed that respondent should handle the strawberries for complainant's account. Complainant denies that any authorization was given respondent to handle the strawberries for its account. The burden is upon respondent, the party alleging a change in the contract terms from f.o.b. to a consignment, to prove such a change by a preponderance of the evidence. *American Banana Co., Inc. v. Marvin Gray*, 41 Agric. Dec. 539 (1982). Respondent has not presented any evidence, other than its own assertions, of the alleged change in contract terms. Therefore, we conclude that respondent has failed to sustain its burden of proof in this regard.

Having accepted the strawberries, respondent became liable for the agreed upon contract price less damages resulting from any breach of warranty by complainant. Respondent has the burden of proving the breach and damages by a preponderance of the evidence. *Farm Market Service, Inc. v. Albertson's Inc.*, 42 Agric. Dec. 429 (1983). As this was an f.o.b. sale, complainant gave the implied warranty of suitable shipping condition, which is defined in the regulations (7 CFR 46.43(j)) as meaning that "the commodity, at time of billing, is in a condition which, if the shipment is handled under normal transportation service and conditions, will assure delivery without abnormal deterioration at the contract destination agreed upon between the parties." The record contains a federal inspection dated June 22, 1984 (Finding of Fact 5), which shows that the strawberries at issue were extremely deteriorated, containing an average of 22% soft and 20% decay. The inspection also reveals

that the temperature of the product ranged from 42° to 45°F. Complainant argues that this high temperature caused the deterioration found by the inspection. However, transportation conditions were normal, as the temperature recording tape shows that a temperature of approximately 35° was maintained throughout transit (Finding of Fact 4). Even if the strawberries were mishandled from the time they arrived at respondent's place of business on June 21, 1984, at 8:00 a.m. to the time of the inspection on June 22, 1984, at 4:45 a.m. such as to cause the pulp temperature to rise to 42 to 45°F., such a rise in pulp temperature would not cause strawberries in suitable shipping condition to experience a total of 44% deterioration after only 21 hours. It is quite clear that the strawberries were excessively deteriorated when they arrived at respondent's place of business and, therefore, were in breach of warranty.

Respondent's damages resulting from complainant's breach of warranty are the difference at the time and place of acceptance between the value of the strawberries if they had been as warranted and their actual value. *Tom Bengard Ranch, Inc. a/t/a Kleen Harvest v. Garden State Farms, Inc.*, 42 Agric. Dec. 922 (1983). The Market News Service Reports for Bronx, New York shows that on June 21, 1984, the value of the strawberries involved herein if they had been as warranted was from \$.75 to \$1.00 per pint, mostly \$.90 to \$1.00 per pint. Using the \$.90 per pint figure results in a price of \$10.80 per flat, or \$12,182.40 for the entire 1,128 flat load. For the actual value of the strawberries, we look to the proceeds of a prompt and proper resale. Respondent claims that \$2,820.00 was received from its buyer, Kleiman & Hochberg, Inc. While the documentation in the record as to this resale is not as complete as we would like, it is apparent from the condition problems of the strawberries that respondent was extremely fortunate to recover even \$2,820.00. Therefore, we find respondent's resale to have been prompt and proper.

Respondent's damages were thus \$12,182.40 less \$2,820.00, or \$9,362.40. This exceeds the contract price of \$7,666.80 and, therefore, respondent had no obligation to remit anything to complainant. Respondent has paid \$2,820.00 to complainant and is not liable for any additional sum. Accordingly, the complaint must be dismissed.

ORDER

The complaint is hereby dismissed.

Copies of this order shall be served upon the parties.

KENT W. NORTHCROSS d/b/a NORTHCROSS DISTRIBUTING, v. CARNIVAL FRUIT CO. INC. PACA Docket No. 2-6671. Decided March 27, 1986.

Commercial unit is entire load—Unloading truck as act of acceptance—

Acceptance of wrongful rejection.

Respondent held to have accepted a truckload of tomatoes when it accepted a part of them for its own use. However, since complainant agreed to its wrongful rejection of the remainder of the load, respondent is not liable for damages.

Dennis Becker, Presiding Officer.

Pro se, for complainant

Pro se, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks \$3,884.50 in connection with a transaction in interstate commerce involving the shipment of cherry tomatoes, a perishable agricultural commodity.

A copy of the Department's report of investigation was served on each of the parties. In addition, respondent was served with a copy of the formal complaint, and filed an answer thereto denying any liability to complainant.

Since the amount claimed as damages did not exceed \$15,000.00, the shortened method of procedure provided in section 47.20 of the Rules of Practice was followed. Under this procedure the verified pleadings of the parties are considered a part of the evidence in the case, as is the Department's report of investigation. In addition, the parties were given the opportunity to submit further evidence by way of verified statement. Complainant filed an opening statement, and respondent filed an answering statement. Neither party filed a brief.

FINDINGS OF FACT

1. Complainant, Kent W. Northcross is an individual doing business as Northcross Distributing, with an address at Rio Rico Industrial Park, Nogales, Arizona 85621.

2. Respondent, Carnival Fruit Co., Inc., is a corporation with an address at 475 N.E. 185th Street, North Miami Beach, Florida 33179. At the time of the transaction involved in this proceeding respondent was licensed under the Act.

3. On May 28, 1984, complainant sold to respondent 1,080 trays of cherry tomatoes at \$6.30 per tray plus \$.40 per tray for palletizing, and \$22.50 for a temperature recording device, for a total contract price of \$7,258.50, f.o.b. The cherry tomatoes were shipped from Arizona to Florida on that date, and arrived in Florida on May 31, 1984, where they were received and accepted by respondent.

4. The transaction was brokered jointly by Joe Yrigoyen Brokerage of Nogales, Arizona, and by The Tobi Company, located in Miami, Florida. Joe Yrigoyen Brokerage issued a Broker's Memorandum of Sale which reflected the terms of the contract, as set forth in paragraph 3, above.

5. Upon arrival of the tomatoes in North Miami Beach, Florida, respondent unloaded the truck, thereby accepting the tomatoes. Its visual inspection revealed that a number of the trays of the tomatoes were already ripe. Therefore, it called for a federal inspection, which was held on May 31, 1984. That inspection showed in pertinent part that the range of temperature for the containers of cherry tomatoes was 58° to 60°F, far in excess of the 45° to 48° temperatures requested by complainant upon the loading of the truck. It also showed as regards condition as follows:

630 Lot:

Average approximately 90% red.
Ranges 2 to 28%, average 11% Soft
Average 1% decay.

450 Flat Lot: Average approximately
20% turning and pink, 80% Light red
& red. No decay

Under the remarks section of the inspection certificate the inspector wrote "Applicant states above lot unloaded and reloaded onto trailer. Above lots separated for inspection by applicant."

6. Although divided into two lots, the cherry tomatoes inspected by the inspection reflected in paragraph 5, above, were the 1,080 trays delivered to respondent by complainant.

7. As a result of the federal inspection the respondent notified complainant through the brokers that it was rejecting the 630 trays of cherry tomatoes which were red because they were over-ripe. However, it stated that it was accepting the 450 trays of cherry tomatoes which were turning and pink. Complainant initially notified respondent that it accepted respondent's actions in rejecting a part of the load of the cherry tomatoes. It placed the 630 trays of cherry tomatoes with another company in Miami, Florida known as Caribe Produce at \$1.00 per tray plus \$.40 per tray for palletizing and handling for a total contract price of \$882.00. Com-

plainant issued an invoice to Caribe Produce for that amount which it dated May 28, 1984, although such invoice was issued later, and which invoice contained the same invoice number as did the original invoice to Carnival Fruit Company. Caribe Produce paid Northcross Distributing \$882.00 with respect to its purchase of the 630 trays of tomatoes.

8. Respondent paid complainant \$3,002.50 for the remaining 450 trays of cherry tomatoes which it kept. That left \$3,374.00 unpaid out of the total contract price of \$7,258.50.

9. A formal complaint was filed in this proceeding on September 13, 1984, which was within nine months of the time the cause of action herein arose.

DISCUSSIONS

This proceeding involves a situation in which respondent wrongfully rejected a portion of a truckload of cherry tomatoes because of their ripe condition upon arrival. However, it also involves a circumstance in which we find that complainant accepted respondent's wrongful rejection, as a result of which respondent must prevail.

Upon arrival of the cherry tomatoes in Miami, Florida respondent determined after visual and federal inspection that 630 of the 1,080 trays were riper than it wished. However, the other 450 trays met its requirements for ripeness. As a result of the federal inspection respondent notified complainant through two brokers, The Tobi Company of Miami, Florida and Joe Yrigoyen Brokerage of Nogales, Arizona that it was rejecting the 630 trays which were overly ripe. It has long been held that a receiver cannot accept a portion of a truckload of a commodity while rejecting the rest. *Salinas Lettuce Farmers Corporative v. Larry Ober Company*, 39 Agric. Dec. 65 (1980). The evidence also reflects that the respondent unloaded and reloaded the tomatoes. This is also an act of acceptance *Theron Hooker Company v. Ben Gatz Co.*, 30 Agric. Dec. 1109, 1112 (1971). Therefore, respondent's rejection of the 630 trays of cherry tomatoes was a wrongful rejection. However, complainant accepted respondent's rejection of the 630 trays of cherry tomatoes. Because complainant agreed to the action of respondent, respondent is absolved from any liability which might arise from its wrongful rejection. See *Walters Produce, Inc. v. Francis Produce, Inc.* 44 Agric. Dec. ____ (1985); *Admiral Packing Co. v. Prevor-Mayrsohn International, Inc.*, 41 Agric. Dec. 99 (1982).

Subsequent to accepting the rejection complainant advised respondent that it was not accepting respondent's rejection of the 630 trays of cherry tomatoes. It told respondent that it considered the

problem to be a transportation problem, as a result of **which** respondent should look to the trucking company for reimbursement for any damages it might have suffered, and that complainant was seeking to recover the full contract price. However, complainant's actions were inconsistent with such action. Complainant issued an invoice to the secondary receiver of the 630 trays, Caribe Produce of Miami, Florida. Caribe Produce paid the full invoice amount of \$882.00 directly to complainant, thereby showing that, **indeed**, complainant had assented to the rejection by respondent. Furthermore, Bobby Wagner, the employee of Northcross Distributing **who** negotiated the contract with respondent, and who discussed the matter with Joe Yrigoyen Brokerage, signed a letter along with Joe Yrigoyen concerning the transaction involved. Those individuals stated that there had been a delay in receipt of a sufficient quantity of cherry tomatoes to fill respondent's order, from **May 25**, to May 28, 1984. Both Mr. Wagner and Mr. Yrigoyen stated **that**:

After several phone conversations between Joe Yrigoyen and Bobby Wagner it was agreed that Carnival Fruit Co., would unload the 450 Flats of Pink to Light Red Cherry Tomatoes at the invoice price, and pay the trucker for **that** portion of the Freight, and that Northcross Distributing would find another receiver in the Miami area to **handle** the balance of 630 Flats of Cherry Tomatoes.

The information quoted above was conveyed to The Tobi Company, and apparently it was not until sometime later that **other** issues with respect to the payment of freight arose. The statement by complainant's broker and employee is very damaging to complainant's case, and must be given great weight.

In review of the above we find that respondent did **not** violate the Act.

ORDER

The complaint is dismissed.

Copies of this order shall be served upon the parties.

TYRE FARM, INC., v. DANDREA PRODUCE, INC. PACA Docket No. 2-6709. Decided March 27, 1986.

Acceptance occurs upon unloading—Broker's statements—Private inspections discounted.

When respondent unloaded a truckload of pickles it accepted them, as a result of which it had the burden to show they did not meet contract specifications. Its provi-

sion of affidavits from private parties are not acceptable as to condition. The statement of the broker as to the transaction is given great weight, as a result of which it was determined that the contract was not modified.

Dennis Becker, Presiding Officer

For complainant, *pro se*.

For respondent, *pro se*

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which complainant sought an award of reparation in the amount of \$11,668.00 in connection with the sale of a truckload of pickles in interstate commerce.

Copies of the report of investigation made by the Department were served upon the parties. A copy of the formal complaint was served upon respondent which filed an answer thereto denying liability to complainant. Because the amount claimed as damages was less than \$15,000.00, the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 CFR § 47.20) is applicable. Under this procedure the verified pleadings of the parties are a part of the evidence in the case, as is the Department's Report of Investigation. In addition, the parties were given the opportunity to file evidence in the form of verified statements. Complainant filed an opening statement consisting of two sworn affidavits. Respondent filed an answering statement consisting of an affidavit. Neither party filed a brief.

FINDINGS OF FACT

1. Complainant, Tyre Inc., is a corporation with an address at 1304 Forest Drive, Sanford, Florida 32771.

2. Respondent, Dandrea Produce, Inc., is a corporation with an address at P.O. Box 184, Harding Highway, Landisville, New Jersey 08326. At the time of the transaction involved in this proceeding, Respondent was subject to license under the Act.

3. On May 26, 1984, complainant sold to respondent a truckload of pickles consisting of 250 bushels of 3/400 green pickles at \$14.00 per bushel for a total price of \$3,500.00, 412 bushels of dill pickles at \$14.00 per bushel for a total price of \$5,768.00, and 200 bushels of choice pickles at \$12.00 per bushel for a total price of \$2,400.00, and a total contract price of \$11,668.00, f.o.b. The pickles were shipped in interstate commerce on May 26, 1984, and were received

and accepted by respondent on or about May 27, 1984. Spike Miller of Parkland, Florida acted as the broker in this proceeding. Respondent has not paid any part of the purchase price for the pickles.

4. A formal complaint was filed in this proceeding on October 31, 1984, which was within nine months of the time of the cause of action herein arose.

DISCUSSION

This proceeding involves a controversy in which complainant claims that it sent a truckload of three different types of pickles to respondent, which truckload was received and accepted by respondent, as a result of which respondent is obligated to pay \$11,668.00, the full contract price. Respondent, on the other hand, claims that the pickles arrived in such deteriorated condition that they were not merchantable, as a result of which because of certain actions on the part of the broker and complainant, it owes complainant nothing for the load. In support of their respective claims the complainant submitted affidavits of itself and the broker, and respondent submitted affidavits of itself and several individuals. The affidavits reflect total disagreement as to the essential facts in this proceeding.

The evidence shows clearly that the load of pickles left Florida on May 26, 1984, and arrived by truck in Landisville, New Jersey on or about May 27, 1984. The evidence further shows that the contract was free on board, as a result of which respondent is responsible for any problems during transport. Furthermore, because the truckload of pickles was unloaded at respondent's place of business before there was an attempted rejection, the pickles were received and accepted by respondent. *Theron Hooker Company v. Ben Gatz Co.*, 30 Agric. Dec. 1109, 1112 (1971); *Sunfresh Distributing Company v. Frank Donia Company*, 43 Agric. Dec. ____ (1984). Therefore, respondent's claim that the goods were rejected on arrival cannot be given recognition.

Respondent claims that after unloading the goods it called the broker, Spike Miller of Parkland, Florida, and talked with him and Gre Farm on the telephone. Respondent claims that while both parties were on the phone Mr. Miller said that a federal inspection was not needed, but rather that respondent should regrade the pickles, which respondent said it did twice, and that they were rejected twice for resale. Complainant's story in this regard is different. Complainant claims that the respondent said there was no need for an inspection, but rather that he would work out the pickles and cause the trucker to stand the loss. Complainant proved his

point through the affidavit of Spike Miller, the broker, whereas the respondent utilized its own affidavit. As an ostensibly neutral third party the testimony of the broker must be given great weight. See *Homestead Tomato Packing Co. v. Mims Produce, Inc.*, 43 Agric. Dec. ____ (1984); *Kern Ridge Growers v. T.J. Power & Co.*, 40 Agric. Dec. 425 (1981). Therefore, insofar as the vying claims as to whether complainant said not to inspect the pickles or respondent said it would take responsibility for the pickles by working them out is concerned we must find in favor of complainant.

Respondent also provided affidavits from three individuals who were not associated with it directly, and who were not federal inspectors, which affidavits were signed much later than at the time of the transaction. These individuals stated that they had looked at the pickles at the time they arrived, and that they were not suitable for human consumption. Spike Miller, in his affidavit, stated that he had talked to one of the individuals and the wife of another of the individuals who signed the affidavits on behalf of respondent, and that there was strong evidence that either the affidavits were not looked at before they were signed or that they were signed merely as a favor to respondent. Respondent sought to rebut the statements of Mr. Miller with his own affidavit rather than replying with affidavits by the same individuals in which they would controvert the claims of the broker. Respondent's efforts in this regard must fail. In view of the strong statements by Mr. Miller that the affidavits of respondent were concoctions of respondent rather than truly reflective of the facts, the proper rebuttal, and that which could be recognized in this proceeding, would have been from the same individuals. Therefore, we must discount the evidentiary value which might have been attached to the affidavits of the individuals. We should, however, caution in this regard that even those affidavits would not have been sufficient to overcome the requirement that damages after acceptance of goods be shown by a cognizable federal inspection. It has long been held that inspections by individuals who are not neutral should be discounted. See *Mutual Vegetable Sales v. Select Distributors, Inc.*, 38 Agric. Dec. 1359 (1979).

Finally, respondent claimed that there were also pickles from Turner Farm on the truck, and that those pickles were equally unmarketable, but that no complaint was made about its failure to pay for them. This matter was not pleaded in the answer. It was raised for the first time in respondent's answering statement. The claim was vague and general, and cannot be given weight. In view of the above we find that respondent has failed to pay complainant \$11,668.00 with respect to the transaction involved in this proceed-

ing. Its failure to pay this amount is a violation of section 2 of the Act for which reparation should be awarded to complainant with interest.

ORDER

Within thirty days of the date of this Order respondent shall pay to complainant, as reparation, \$11,668.00, with interest thereon at the rate of 13% per annum from July 1, 1984, until paid.

Copies of this order shall be served upon the parties.

HUNT OIL Co., a/t/a PLANTATION PRODUCE Co., v. ANTON T. KASTNER d/b/a TONY KASTNER & SON WHOLESALE PRODUCE Co.
PACA Docket No. 2-6729. Decided April 10, 1986.

Delivered sale—Shipper responsible for transit conditions—Merchantable—Defined—Damages—Accepted goods—Contracts—Non-negotiated terms added to bill of lading by shipper do not contractually bind buyer.—Evidence—lack of motive to falsify records considered.

Cabbage sold on a delivered basis was found to have been sold without any grade specification. Necessity that cabbage be of merchantable quality required that it be of fair average quality—neither the best nor the poorest quality. Federal inspections made promptly after arrival and acceptance of the cabbage showed breach of warranty of merchantability. Market reports did not cover cabbage in same size containers as shipped and damages were awarded based on difference between the delivered contract price and the gross proceeds of respondents prompt and proper resale. Statement placed on bill of lading by complainant declaring that no claims would be honored unless temperature recorder was secured and noted on trucks receipts was not contractually binding on respondent buyer. Respondent lost temperature recorder and tape but read the tape on arrival and noted on the bill of lading that temperature was 36°. In view of the fact that transit temperature was responsibility of complainant in delivered sale, respondent had no motive to falsify temperature notation.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks an award of reparation against respondent in the amount of \$9,397.35 in connection with the shipment in interstate commerce of a mixed truckload of cabbage and parsley.

A copy of the report of investigation made by the Department was served upon the parties. A copy of the formal complaint was

served upon respondent, which filed an answer thereto denying liability to complainant, and asserting a counterclaim against complainant arising out of the same transaction in the amount of \$814.50. Respondent later amended the amount of damages claimed in the counterclaim to \$1,782.15. Complainant filed a reply to the counterclaim denying any liability thereunder.

The amount claimed in neither the formal complaint nor counterclaim exceeds \$15,000, and the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 CFR § 47.20) is applicable. Pursuant to this procedure, the verified pleadings of the parties are considered a part of the evidence in the case, as is the Department's report of investigation. In addition, the parties were given an opportunity to file evidence in the form of sworn statements. Complainant filed an opening statement, respondent filed an answering statement, and complainant filed a statement in reply. Both parties filed briefs.

FINDINGS OF FACT

1. Complainant, Hunt Oil Company, is a corporation also trading as Plantation Produce Co., whose address is P.O. Box 1043, Mission, Texas. At the time of the transaction involved herein complainant was licensed under the Act.

2. Respondent, Anton T. Kastner, is an individual doing business as Tony Kastner & Son Wholesale Produce, whose address is 2225 North Humbolt, Milwaukee, Wisconsin. At the time of the transaction involved herein respondent was licensed under the Act.

3. On or about February 9, 1984, complainant sold to respondent 273 sacks of New Cabbage brand green cabbage at \$12.00 per sack; 150 1 2/5 wirebound crates of cabbage at \$12.00 per crate; 200 sacks of Valley Kist brand slaw cabbage at \$15.25 per sack; 40 wirebound crates of Plantation brand curly parsley, 5 dozen size, at \$12.00 per crate; and 86 cartons of Valley Kist brand green cabbage at \$17.25 per carton, or a total price of \$10,089.50 delivered to respondent's place of business in Milwaukee, Wisconsin.

4. The produce was shipped by complainant on February 1984, at 2:00 a.m. from Mission, Texas to respondent in Milwaukee. The bill of lading stated that the expected delivery date was February 12, at midnight. The produce arrived at respondent's place of business sometime on February 14, 1984, and was accepted by respondent.

5. Complainant included a Ryan temperature recorder on the load, and the bill of lading had stamped in block print on its face "RECEIVER: This load contains a temperature recorder. No claims honored unless recorder secured and noted on truck's receipts."

Upon receiving the load respondent made notations on the face of the bill of lading indicating that the 273 sacks of New Cabbage brand green cabbage and the 150 1 2/5 wirebound crates of cabbage both showed decay and slime. Respondent looked at the tape from the Ryan recorder and recorded on the bill of lading that the temperature was 36°.

6. Respondent notified complainant through the broker of the poor condition of the cabbage on arrival, and was instructed to secure a federal inspection. A federal inspection was made on February 15, 1984, at 8:30 a.m. of cabbage located in respondent's warehouse. The certificate issued as a result of such inspection showed in relevant part as follows:

Products Inspected	Domestic type CABBAGE in crates stamped "Produce of Mexico" or in open mesh bags printed "Produce of U.S.A., 50 Lbs. Net Wt., New Cabbage." Applicant states lot consists of 373 sacks and 150 crates.
Condition of Load:	Crate lot: Stacked on pallets in applicant's cooler. Bag lot: Stacked in applicant's warehouse.
Temperature of Product:	Crate lot: At various locations 43°F. Bag lot: At various locations 54° to 55°F.
Condition:	Crate lot: Serious damage by numerous black sunken areas ranges from 60 to 80% per crate, averages 75%. Damage by yellowing in most crates 10 to 20%, some none averages 10%. Decay in most crates 10 to 30%, some none, average 15%. Bag lot: Serious damage by yellowing ranges from 50 to 90% per crate, averages 67%. Decay ranges from 10 to 50% per crate, averages 33%. Each lot: Decay is Bacterial Soft Rot generally in advanced stages.

7. Respondent communicated the results of the inspection through the broker to complainant, and informed complainant that respondent would pay for the parsley, but would only handle the cabbage for the shipper. Later on February 15, complainant com-

municated to respondent its request that another inspection be made which would cover all of the cabbage on the load. Respondent requested a second federal inspection and on February 16, 1984, at 2:05 p.m., a second inspection was made at respondent's warehouse which showed in relevant part as follows:

Products Inspected:	Domestic Type CABBAGE in crates stamped, "Produce of Mexico", or in cartons printed, "Valley Kist Brand, Produce of U.S.A., Cabbage, 1 2/5 Bushel, Plantation Produce Company, Mission, Texas" or in bags printed, "Valley Kist Cabbage, Produce of U.S.A., net wt. 50 lbs, Plantation Produce Co., Mission, Texas," or in bags printed, "New Cabbage, Produce of U.S.A., 50 lbs. net wt." Applicant states: 150 crates, 86 cartons and 573 sacks.
Condition of Load:	<i>Each Lot:</i> Stacked on pallets in applicant's cooler.
Temperature of Product:	<i>Each Lot:</i> Various locations; 41°F.
Condition:	<i>Each Lot.</i> Heads or portions of heads not affected by condition defects are fresh, crisp and green color <i>Carton Lot.</i> Damage by numerous sunken discolored areas ranges 16 to 24% averages 20%, including 7% serious damage. No Soft Rot. <i>Crate Lot:</i> Serious damage by yellowing ranges 6 to 14%, averages 10% Serious damage by numerous sunken discolored areas ranges 66 to 84%, averages 75%. Soft Rot ranges 10 to 20%, averages 15%. <i>Open Mesh Sack New Cabbage Lot:</i> Serious damage by yellowing ranges 50 to 70%, averages 60%. Soft Rot ranges 30 to 50%, averages 40% <i>Open Mesh Sack Valley Kist Brand:</i> <i>Larger Cabbage Lot:</i> Damage by yellowing ranges 12 to 26%, averages 20%, including 5% serious damage. No soft Rot.

Open Mesh Sack Valley Kist Smaller Cabbage Lot.T1 Serious damage by numerous sunken discolored areas ranges 20 to 30%, averages 25%. Serious Damage by yellowing ranges 30 to 46%, averages 40% Soft Rot ranges 26 to 50%, averages 35%. Each Lot: Soft Rot is Bacterial Soft Rot in advance Stages

8. On February 29, 1984, at 2:00 p.m. a third federal inspection was made at respondent's processing plant of 50 sacks of the New Cabbage brand cabbage and 150 crates of the wirebound crate cabbage stamped "Produce of Mexico, 50 lbs. Net Wt.". The inspection showed that the temperatures in each lot in various locations ranged from 35° to 42°F. Decay in each lot averaged 100% Bacterial Soft Rot in advanced stages. This cabbage was dumped by respondent.

9. Respondent dumped 200 containers of the cabbage and sold the remaining cabbage in a prompt and proper manner for \$1.00 per container, or a total of \$509.00.

Respondent has paid complainant a total of \$692.14 which included \$480.00 as payment in full for the 40 wirebound crates of parsley. The remaining \$212.14 was the remainder of the \$509.00 gross proceeds realized from the resale of the cabbage, after deduction of a commission of \$50.90, inspection fees in the total amount of \$195.95, and an unloading charge of \$50.00.

10. The formal complaint was filed on October 1, 1984, which was within nine months after the cause of action alleged herein accrued.

CONCLUSIONS

Complainant brings this action to recover the balance of the purchase price of four lots of cabbage sold and shipped to respondent on a delivered basis, and accepted by respondent on arrival. Since respondent accepted the cabbage respondent became liable to complainant for the full purchase price thereof less any damages resulting from any breach of contract on the part of complainant. Although respondent maintained that the cabbage was sold as U.S. No. 1, the broker's Memorandum of Sale, as well as complainant's invoice, show otherwise. We conclude that the cabbage was sold on a no grade basis.

Under the terms of the delivered sale contract complainant was obligated to deliver cabbage at respondent's place of business in

merchantable condition. In this context, merchantable does not mean merely that the goods can be sold. We have stated that:

The term "merchantable" has been defined as "goods which are reasonably suited for the ordinary uses and purposes of goods of the general type described by the terms of the sale and which are capable of passing in the market under the name or description by which they are sold," and though not descriptive of goods of the best quality, neither does it imply goods of the poorest quality, but covers goods of a fair, average quality. See *L. Gillaarde Sons Co. v. Moritz*, 21 Agric. Dec. 590 (1962) and *Samuel P. Mandell Co. v. Sam Catanzaro*, 17 Agric. Dec. 21 (1958).

The federal inspections made of the cabbage on February 15, and 16, 1984, show that none of the lots of cabbage were in merchantable condition according to the definition quoted above. The record shows that respondent promptly secured buyers for the cabbage, and although the price secured was low, considering the extremely poor condition of most of the cabbage we find that respondent acted reasonably under the circumstances.

Complainant argues strenuously that the 150 wirebound crates of no brand cabbage which it shipped to respondent had no markings on the crates indicating that such cabbage was "Produce of Mexico." Complainant submitted several affidavits by persons who stated they had seen the crates prior to shipment and who affirmed that no such markings were on the crates. Complainant contends that the 150 wirebound crates of cabbage which were the subject of the federal inspections at destination were not the same 150 crates which complainant shipped. Complainant requested on this basis that a personal investigation be done of respondent's records by the Department to ascertain what cabbage from other sources was on hand during the time period when complainant's cabbage arrived. Such investigation was done by this Department with the following results:

Respondent's receiving book showed the only cabbage it received from Texas was the lot involved in the complaint. The receiving book showed other cabbage received during January, February and March, 1984 was purchased from Borzynski Farms, Inc., Sturtevant, Wisconsin. There was no evidence in respondent's records to show it received any other cabbage originating from Texas or other lots of cabbage which contained the marking "Produce of Mexico."

We conclude on the basis of all of the evidence that the 150 wire-bound crates of cabbage shipped by complainant were stamped with the marking "Produce of Mexico".

As stated earlier respondent has shown by the prompt federal inspections made after arrival of the produce that complainant breached the contract of sale. UCC § 2-714 provides in relevant part that "where the buyer has accepted goods and given notification . . . He may recover as damages for any non-conformity of tender the loss resulting in the ordinary course of events from the seller's breach as determined in any amount which is reasonable." The same section of the UCC provides that the measure of damages for breach of warranty is "the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted. . . ." Respondent submitted Market News Reports for Chicago covering sales on February 14, 15, and 16, 1984, in an effort to show the value which the cabbage would have had if it had been as warranted. However, such reports give quotations only for 1 3/4 bushel cartons and crates rather than the 1 2/5 bushel cartons and crates which were sold by complainant. In addition the reports give quotations for 50 pound sacks, but such quotations are broken down in categories of large or small to medium size sacks. There is no adequate indication in this record as to what size cabbage was contained in the sacks sold by complainant. While the second federal inspection does indicate that the 200 sacks of slaw cabbage consisted of a "larger cabbage lot and a smaller cabbage lot," we do not know the number of sacks in either lot. In the absence of official market reports we will use the contract delivered price of the cabbage as the closest possible approximation of its market value. See *Corte & Sons v. Lerner & Son*, 14 Agric. Dec. 320 (1955). Accordingly, the value of the cabbage if it had been as warranted was \$9,609.50. The actual value of the cabbage delivered is shown by the gross proceeds of a prompt and proper resale which in this case amounted to \$509.00. Deducting the latter amount from the former leaves \$9,100.50 as respondent's basic damages in regard to the cabbage. The UCC § 2-714 provides that in a proper case any incidental and consequential damages may also be recovered. The \$50.90 commission, as well as the \$195.95 inspection fees, are allowable as incidental and consequential damages. Respondent's total damages for the cabbage thus amount to \$9,347.35. This amount deducted from the total delivered price for all of the produce leaves \$742.15 as the correct amount owed by respondent to complainant. Of this amount respondent has already paid complainant \$692.15, which leaves a balance still due and owing from respondent to complain-

ant of \$50.00. This \$50.00 was an unloading fee which respondent claimed as a part of its damages but which cannot be allowed since, as far as this record shows, such fee would have been incurred by respondent regardless of complainant's breach. Respondent's failure to pay complainant the amount of \$50.00 is a violation of section 2 of the Act for which reparation should be awarded to complainant with interest.

Complainant also alleged as an additional basis of recovery that respondent failed to secure the temperature recorder tape as requested pursuant to the instructions stamped on the bill of lading which stated "NO CLAIMS HONORED UNLESS RECORDER SECURED AND NOTED ON TRUCKS RECEIPTS." However, respondent did secure the recorder, read the tape, and noted on the bill of lading that the temperature was 36°. What complainant really complains of is respondent's subsequent loss of the temperature tape and its inability to supply such tape as evidence in this proceeding. Even if we were to find that this was a failure to conform with the instructions on the bill of lading, complainant has not shown any reason why we should consider respondent contractually bound by such instructions. Furthermore, since this was a delivered sale with complainant being responsible for transit conditions, respondent had no motive to note any temperature on the bill of lading other than the correct temperature which respondent read from the tape. We conclude that complainant has failed to state an adequate basis on which it can recover against respondent in this proceeding for loss of the temperature tape.

Respondent's counterclaim arose out of the same transaction as that alleged in the formal complaint and was predicated on the basis of alleged Market News Service Report values for the cabbage which were in excess of the contract price used by us to compute damages. Consequently respondent's counterclaim must be dismissed.

ORDER

Within thirty days of the date of this order, respondent shall pay to complainant, as reparation, \$50.00 with interest thereon at the rate of 13% per annum from March 1, 1984, until paid.

The counterclaim is dismissed.

Copies of this order shall be served upon the parties.

SENEVA J. BERRY, d/b/a SUNNY FARMS, v. QUALITY KING PRODUCE CO. INC. PACA Docket No. 2-7070. Decided April 10, 1986.

Dennis Becker, Presiding Officer.

For complainant, *pro se*

or respondent, *pro se*

Decision by Donald A. Campbell, Judicial Officer.

REPARATION ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant sought a reparation award against respondent in the amount of \$38,392.50 in connection with three shipments of potatoes in interstate commerce. A copy of the formal complaint was served upon respondent, which filed an answer thereto, admitting the material allegations of the complaint, and admitting indebtedness to the complainant in the amount of \$10,392.50, claiming that it had already paid complainant \$28,000.00 of the amount sought by complainant. Complainant was informed by certified mail of respondent's claim that it had paid \$28,000.00 of the amount sought and was given an opportunity to dispute such payment. Complainant did not dispute such payment. We conclude, therefore, that \$28,000.00 of the \$38,392.50 has been paid, and that the remaining indebtedness is \$10,392.50, which is the amount respondent admits it owes the complainant. Consequently, the issuance of an order in the amount of \$10,392.50 without further procedure is appropriate, pursuant to section 47.8(d) of the Rules of Practice (7 CFR 47.8(d)).

Complainant, Seneva J. Berry, doing business as Sunny Farms, is an individual whose address is P. O. Box 1, Edison, California 93220. Respondent, Quality King Produce Co., Inc., is a corporation whose address is 8-10 New England Produce Center, Chelsea, Massachusetts 02150. At the time of the transaction involved herein, respondent was licensed under the Act.

The facts alleged in the formal complaint, as modified above, are hereby adopted as findings of fact of this order. On the basis of these facts, we conclude that the actions of respondent are in violation of section 2 of the Act (7 U.S.C. 499b) and have resulted in damages to complainant of \$10,392.50. Accordingly, within 30 days from the date of this order, respondent shall pay to complainant, as reparation, \$10,392.50, with interest thereon at the rate of 13 percent per annum from July 1, 1985, until paid.

Copies of this order shall be served upon the parties.

BECKMAN PRODUCE, INC., v. MARVIN G. HOLPERIN d/b/a UNIQUE
FOODS Co. PACA Docket No. 2-7116. Decided April 10, 1986.

Decision by Donald A. Campbell, Judicial Officer.

ORDER REQUIRING PAYMENT OF UNDISPUTED AMOUNT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed on November 12, 1985. Complainant seeks to recover \$4,372.41, which amount is alleged to be the remaining balance for mixed produce sold to and accepted by respondent on April 30 and May 7, 1985. Respondent filed an answer to the complaint on February 18, 1986. In this answer, respondent admitted owing complainant \$3,100.00 of the \$4,372.41 claimed by complainant.

Section 7(a) of the Act (7 U.S.C. § 499g(a)) provides, in part:

If after the respondent has filed his answer to the complaint, it appears therein that the respondent has admitted liability for a portion of the amount claimed in the complaint as damages, the Secretary . . . may issue an order directing the respondent to pay the complainant the undisputed amount . . . leaving the respondent's liability for the undisputed amount for subsequent determination.

Accordingly, under the authority of the above quoted section, respondent shall pay to complainant, as an undisputed amount, \$3,100.00. Payment of this amount shall be made within 30 days from the date of this order with interest thereon at the rate of 13 percent per annum from May 1, 1985, until paid. A failure to pay this amount within 30 days will constitute a violation of section 2 of the Act, 7 U.S.C. § 499b.

Respondent's liability for payment of the disputed amount is left for subsequent determination in the same manner and under the same procedure as if no order for the payment of the undisputed amount had been issued.

Copies of this order shall be served upon the parties.

SAHARA PACKING COMPANY v. N. P. DEOUDS, INC. PACA Docket
No. 2-6755. Decided April 11, 1986.

Transit conditions—Discrepancy between ambient air temperatures and pulp temperatures.—Good Delivery Standards—Lettuce found abnormally deteriorated—Damages—accepted goods.

Complainant sold and shipped a truckload of lettuce to respondent on a F.O.B. basis. Following acceptance on arrival a prompt Federal inspection in respondent's warehouse showed pulp temperatures substantially lower than ambient air temperatures shown by tape from temperature recorder. Pulp temperatures were found to show that transit was normal and Good Delivery Standards were therefore applicable. Lettuce was found to have been abnormally deteriorated on arrival and complainant to have breached the contract of sale. Damages were allowed based on difference between delivered cost of lettuce and gross proceeds of prompt and proper resale.

George S. Whitten, Presiding Officer.

Matthew N. McTierney, Newport Beach, California, for complainant.

For respondent, *pro se*

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which complainant seeks an award of reparation against respondent in the amount of \$5,277.50 in connection with the shipment in interstate commerce of a truckload of lettuce.

A copy of the report of investigation made by the Department was served upon the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto denying liability to complainant.

The amount claimed in the formal complaint does not exceed \$15,000.00, and the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 CFR § 47.20) is applicable. Pursuant to this procedure, the verified pleadings of the parties are considered a part of the evidence in the case, as is the Department's report of investigation. In addition, the parties were given an opportunity to file evidence in the form of sworn statements. Complainant filed an opening statement, and respondent filed an answering statement. Complainant filed a brief.

FINDINGS OF FACT

1. Complainant, Sahara Packing Company, is a corporation whose address is P.O. Box 156, Brawley, California.

2. Respondent, N. P. Deodes, Inc., is a corporation whose address is 270 Fifth Street, N.E., Washington, D. C. At the time of the transaction involved herein, respondent was licensed under the Act.

3. On or about September 16, 1983, complainant sold to respondent, 850 cartons of Sahara brand lettuce at \$8.00 per carton, plus precooling and temperature recorder, for a total invoice price of \$7,375.00 f.o.b.

4. On September 16, 1983, at approximately 9:30 a.m., complainant shipped the lettuce from loading point in Brawley, California to respondent in Washington, D. C. by truck. The lettuce arrived at respondent's place of business in Washington, D. C. on September 17, at approximately 5:00 a.m., and was unloaded from the truck by respondent. Respondent requested a federal inspection at approximately 6:30 a.m., and at 7:50 a.m. on September 21, 1983, the 850 cartons of lettuce were federally inspected while stacked in respondent's warehouse. Such inspection showed the temperatures in the lettuce to range from 42 to 43°F and stated the condition to be as follows:

Heads or portion of heads not affected by condition defects are fresh and crisp.

Wrapper leaves: Decay ranges from 4 to 20 heads in most cartons, none in some, average 30%.

Head leaves: 2 to 4 decayed heads in most cartons, none in some, average 10%.

Decay is Bacterial Soft Rot in various stages affecting 2 leaves to ½ of head.

5. The Stires temperature tape recovered from the load shows that the tape began at 9:00 a.m. on September 16, 1983, and the sight day scale is checked on the tape. The trace begins at approximately the two hour mark on the tape in the 70° range, and falls rapidly to about 47° where it continues until the twelve hour mark. From the twelfth hour to the thirtieth hour the trace reads approximately 48°, and from the thirtieth hour to the forty-fourth hour the trace reads approximately 50°. At the forty-fourth hour the tape drops to about 46°, and rises again to the 50° range at about the fifty-fourth hour from the fifty-fourth hour to the sixtieth hour the trace gradually rises to about 55°. From the sixtieth hour to the one hundred and second hour the trace remains at approximately 55°. From the one hundred and second hour until the trace ends at approximately the one hundred and fourteenth hour the trace reads approximately 57°.

7. Respondent resold the lettuce and realized gross proceeds of \$5,491.50. From this amount respondent deducted freight in the amount of \$2,635.00, inspection fee \$35.00, brokerage \$127.50, handling at \$.15 per carton or \$127.50, and a commission charge of 15%, or \$823.73. The net proceeds computed by respondent were \$1,742.77. Respondent paid complainant on the basis of \$1.50 per carton, plus \$.65 cooling, and \$22.50 for the temperature recorder, or \$1,850.00. In addition respondent paid complainant \$.35 per carton, or \$297.50, which it recovered from the trucker. Respondent's total payment to complainant was \$2,147.50.

8. The informal complainant was filed on June 18, 1984, which was within nine months after the cause of action alleged herein accrued.

CONCLUSIONS

The dispute between the parties to this proceeding centers on the question as to whether transportation services and conditions were normal. In a f.o.b. sale the warranty of suitable shipment is applicable only if transportation is normal. See *McIntire v. Wholesale Produce Supply, Inc.*, 37 Agric. Dec. 1206 (1936). In this case there is a perplexing discrepancy between the air temperatures shown by the Stires temperature recorder during transit and the pulp temperature shown by the federal inspection on shortly after arrival. The bill of lading shows that the lettuce had a pulp temperature of 36° when it was placed on the truck. The pulp temperatures disclosed by the federal inspection on arrival show a rise during the 4 and 1/4 day transit period of 6 to 7° above the pulp temperature. However, the Stires temperature recorder tape shows a gradual rise in temperature from about 46° to 57° during the same period. The temperature recorder was returned to the Recording Thermometer Company on October 7, 1983. On July 23, 1984, such company issued a "Calibration Request" stating that they had reviewed a copy of the chart and found it to be correct within 2°.

There was not sufficient time between the arrival of the truck with the lettuce and the federal inspection for such lettuce to have cooled down by the temperatures in respondent's cooler. Accordingly, we must accept the pulp temperatures shown by the federal inspection as an accurate reflection of the temperature of the lettuce itself when it came off the truck. Apparently either the ambient temperatures in the trailer were actually lower than shown on the tape or such air temperature was simply insufficient to raise the pulp temperatures of the lettuce more than the

6 or 7" reflected by the federal inspection. We conclude that transportation services and conditions were normal.

The condition of the lettuce as shown by the federal inspection at destination clearly shows that such lettuce was abnormally deteriorated. See Good Delivery Standards for lettuce, 7 CFR § 46.44. We conclude that complainant breached the contract of sale. Respondent accepted the lettuce and is liable to complainant for the full purchase price thereof less damages resulting from complainant's breach.

Sections 2-714 of the Uniform Commercial Code provides in relevant part that the measure of damage for seller's breach in regard to accepted goods is the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted. In the absence of other evidence the delivered costs of the lettuce, or \$10,010.00, is accepted as the value such lettuce would have had if it had been as warranted. This figure consists of the f.o.b. price of \$7,375.00 plus the freight cost of \$2,635.00. Respondent appears to have promptly and properly disposed of the lettuce for gross proceeds of \$5,491.50. This sum is accepted as the best evidence of the value of the lettuce received by respondent. The difference between these two values, or \$4,518.50, represents respondent's damages. In addition, respondent incurred a \$35.00 inspection fee, brokerage in the amount of \$127.50, a handling fee in the amount \$127.50, and also should be allowed the claimed 15% commission, or \$823.73. Consequently, respondent's total damages are \$5,632.23. However, inspection fees may not be included in damages. Thus, the total compensable damages are \$5,597.23. This amount deducted from the total purchase price of \$7,375.00 leaves \$1,777.77 as the amount which respondent should have paid complainant. Respondent has actually paid complainant in excess of this figure, and consequently the complaint should be dismissed.

This complaint is dismissed.

Copies of this order shall be served upon the parties.

PRODUCE DISTRIBUTORS INC., v. MICHAEL BROS. INC. PACA Docket
No. 2-6775. Decided April 11, 1986.

Jurisdiction—no timely complaint as to transactions alleged as set-off against complaint—Payment—Allocation by respondent ineffective—Actual payment substantially less than stated allocation—Payment—Allocation by complainant to earliest transactions upheld.

Complainant sought to recover the balance of the purchase price due on two shipments of produce. Respondent raised defenses to complainant's action based on three earlier transactions and it was found that respondent had not filed a timely complaint relative to such transactions. A payment allocation attempted by respondent was found ineffective because the statement accompanying the payment showed an allocation of funds substantially in excess of the amount of the payment. Complainant's allocation of the payment to earlier transactions was therefore justified.

George Whitten, Presiding Officer.

Pro se, complainant and respondent.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks an award of reparation against respondent in the total amount of \$12,779.44 in connection with the shipment in interstate commerce of several lots of perishable produce.

A copy of the report of investigation made by the Department was served upon the parties. A copy of the formal complaint was served upon respondent which defaulted in the filing of an answer. Subsequently the proceeding was reopened after default, and respondent filed an answer within the time allowed denying liability to complainant.

The amount claimed in the formal complaint does not exceed \$15,000.00, and the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 CFR § 47.20) is applicable. Pursuant to this procedure, the verified pleadings of the parties are considered a part of the evidence in the case, as is the Department's report of investigation. In addition, the parties were given an opportunity to file evidence in the form of sworn statements. Complainant filed an opening statement, respondent filed an answering statement, and complainant filed a statement in reply. Respondent also filed a brief.

FINDINGS OF FACT

1. Complainant, Produce Distributors, Inc., is a corporation whose address is 111 Northfield Avenue, West Orange, New Jersey.

2. Respondent, Michael Bros., Inc., is a corporation whose address is 38 Providence Fruit & Produce Building, Harris Avenue, Providence, Rhode Island. At the time of the transactions involved herein respondent was licensed under the Act. 1113. On or about August 26, 1983, complainant sold to respondent, and caused to be shipped from the State of California to respondent in West Orange, New Jersey, 1560 containers of grapes for a f.o.b. price of \$5,955.44. Complainant invoiced respondent for these grapes on September 1, 1983, by its invoice number 7054.

4. On or about October 19, 1983, complainant sold to respondent, and caused to be shipped from the State of California to respondent in West Orange, New Jersey, 1,008 containers of cantaloupes for a f.o.b. price of \$7,028.10. Complainant invoiced respondent for these cantaloupes on October 23, 1983, by its invoice number 7516.

5. On or about October 21, 1983, complainant sold to respondent, and caused to be shipped from the State of California to respondent in West Orange, New Jersey, 1,200 containers of Valencia oranges for a f.o.b. price of \$7,410.00. Complainant invoiced respondent for these oranges on October 26, 1983, by its invoice number 7577.

6. On or about November 8, 1983, complainant sold to respondent, and caused to be shipped from the State of Washington to respondent in West Orange, New Jersey, 494 containers of apples for a f.o.b. price of \$6,113.50. Complainant invoiced respondent for these apples on November 21, 1983, by its invoice number 7696.

7. On January 27, 1984, respondent paid complainant in full for complainant's invoice number 6909 dated August 26, 1983, covering an August 10, 1983, shipment of melons at a total f.o.b. price of \$5,513.50. On January 27, 1984, respondent paid complainant in full for complainant's invoice number 7007 dated August 28, 1983, covering an August 22, 1983, shipment of nectarines and plums at a total f.o.b. price of \$16,219.50.

8. The four shipments of produce covered by Findings of Fact 3 through 6 have a total invoice value of \$26,507.04. Of February 24, 1984, respondent paid complainant a total of \$13,727.60. A statement accompanying the payment check indicated that by such payment invoice 7054 was being paid in the amount of \$3,406.54; invoice 7516 in the amount of \$7,028.10; invoice 7577 in the amount of \$7,410.00; and invoice 7696 in the amount of \$6,113.50. The statement also indicated that invoice 6909 had been overpaid in the amount of \$360.54, and invoice 7007 had been overpaid in the amount of \$9,870.00.

9. On February 27, 1984, complainant wrote to respondent stating that the payment of \$13,727.60 was being applied by complainant as follows: \$5,955.44 to invoice 7054; \$7,028.10 to invoice 7511 and \$744.06 to invoice 7577. Complainant informed respondent that there remained due to complainant from respondent the sums of \$6,665.94 on invoice 7577, and \$6,113.50 on invoice 7696, or a total of \$12,779.44.

10. An informal complaint was filed on May 7, 1984, which was within nine months after the causes of action herein accrued.

CONCLUSIONS

Complainant brings this action to recover the balance of the purchase price due on invoice number 7577 dated October 26, 1983, in the amount of \$6,665.94, and the total due on invoice 7696 dated November 21, 1983, in the amount of \$6,113.50. Respondent's defenses to complainant's action are raised only in regard to complainant's invoices 6909 dated August 26, 1983, 7007 dated August 28, 1983, and 7054 dated September 1, 1983. Respondent claims that its payment in full on January 27, 1984, of complainant's invoices number 6909 and 7007 was a mistake. Respondent states that the shipments of produce covered by these invoices were in poor condition on arrival, and that at the time the inadvertent full payments were made, a dispute was underway with complainant in regard to such invoices. Respondent also states that there was trouble with the produce covered by complainant's invoice 7054, and that the partial payment in the amount of \$3,406.54 shown by respondent's statement which accompanied the \$13,727.60 payment check dated February 24, 1984, represented the net returns realized from the resale of the produce covered by such invoice.

Respondent's first notice to this Department of its claims relative to these three invoices was made on June 29, 1984, in a letter which responded to Departmental inquiries which had been prompted by the informal complaint filed by complainant. This letter was filed with the Department more than nine months following the accrual of the causes of action which respondent alleged relative to these three invoices. Respondent's defense herein is, in effect, an attempt to set off, in whole or in part, these three invoices against the balance alleged to be due by complainant on invoices 7577 and 7696. Section 6(a) of the Act (7 U.S.C. 499f(a)) provides in relevant part that "[a]ny person complaining of any violation of any provision of Section 2 of this Act by any commission merchant, dealer, or broker may, at any time within nine months after the cause of action accrues, apply to the Secretary by petition . . ." Since the first claim filed by respondent with this De-

partment relative to the three transactions which it wishes to set off against complainant's claim herein, was clearly made more than nine months after the cause of action relative to such transactions accrued, we do not have jurisdiction to adjudicate any allegations relative to such transactions. See *North Shore Produce Co., Inc. v. Eastco Produce Distributors, Inc.*, 40 Agric. Dec. 621 (1981).

It should be noted that the payment in the amount of \$13,727.60 made by respondent on February 24, 1984, cannot be deemed as being allocated in the manner in which respondent designated in the statement which accompanied its check, for the simple reason that such statement shows an allocation of a total amount of \$23,958.14, whereas the payment amounted to only \$13,727.60. In view of this fact complainant was warranted in allocating the payment to its earlier invoices. See *Mendelson-Zeller Co. v. Bleier*, 34 Agric. Dec. 683 (1975).

We also note that even if there had been on record a timely informal complaint relative to invoices 6909, 7007, and 7054, respondent would still have lost on the merits, due to respondent's failure to submit adequate accountings covering the resale of the produce covered by such invoices.

There remains due and owing to complainant from respondent the total amount of \$12,779.44. Respondent's failure to pay complainant such amount is a violation of section 2 of the Act for which reparation should be awarded to complainant with interest.

ORDER

Within thirty days from the date of this order, respondent shall pay to complainant, as reparation, \$12,779.44, with interest thereon at the rate of 13% per annum from December 1, 1983, until paid.

Copies of this order shall be served upon the parties.

R.F. DONOVAN FARMS, INC., v. CORGAN & SON INC. PACA Docket
No. 2-6800. Decided April 11, 1986.

Market price for consigned vegetables—freight deducted from gross proceeds.

Where there is no valid account of sales present, the market price for consigned goods is determined based on the Market News Service Reports. Freight must be deducted from the total, as that is an expense borne by complainant.

Andrew Stanton, Presiding Officer.

Thomas R. Oliveri, Newport Beach, California, for complainant

Pro se, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of \$45,634.37 in connection with the consignment to respondent of 14 truckloads of mixed vegetables in interstate commerce.

A copy of the report of investigation prepared by the Department was served upon each of the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto admitting liability for \$44,726.21, but denying liability for \$908.16.

Although the amount claimed as damages exceeds \$15,000.00, the parties waived oral hearing. The shortened procedure provided in section 47.20 of the Rules of Practice (7 CFR § 47.20) is, therefore, applicable. Pursuant to such procedure, the report of investigation is considered to be part of the evidence, as is the verified complaint. The answer, since it is not verified, is not considered part of the evidence. The parties were given an opportunity to submit additional evidence in the form of verified statements and to file briefs, but chose not to do so.

FINDINGS OF FACT

1. Complainant, R. F. Donovan Farms, Inc., is a corporation whose address is P.O. Box 1669, Santa Maria, California.

2. Respondent, Corgan & Son Inc., is a corporation whose address is 161-162 New York City Terminal Market, Bronx, New York. At the times of the transactions involved herein, respondent was licensed under the Act.

3. On approximately June 6 and 20, July 3 and 19, August 1, 8, 15, 25, and 31, September 6, 13, 25, and 27, and October 4, 1984, complainant consigned to respondent 14 loads of mixed vegetables.

4. The 14 loads of mixed vegetables were shipped, in interstate commerce, to respondent, who accepted them for handling on consignment for the account of complainant. Respondent prepared and sent to complainant accounts of sale for each load except the one shipped on September 13, 1984. The accounts of sale showed net proceeds, after deductions of freight, commission, and various other

expenses, of \$44,726.21. Respondent has failed to pay complainant any part of this sum.

5. According to the Market News Service Reports for New York, New York on September 17, 1984, the market price for artichokes, the commodity in the September 13, 1984, shipment to respondent, was \$12.00 to \$14.00 per flat.

6. Respondent has failed to make any payment to complainant for the September 13, 1984, shipment.

7. A formal complaint was filed on January 30, 1985, which was within nine months from when the causes of action herein accrued.

8. Respondent filed an unsworn answer on April 8, 1985, in which it admitted liability to complainant in the amount of \$44,726.21 for 13 of the 14 truckloads of mixed vegetables at issue. Accordingly, an Order Requiring Payment of Undisputed Amount was issued on June 21, 1985, ordering respondent to pay to complainant the undisputed amount owing of \$44,726.21.

CONCLUSIONS

In respondent's unsworn answer, it does not deny liability for 13 of the 14 truckloads which it handled on consignment for the account of complainant. Respondent claims that its liability for the September 13, 1984, shipment is less than the \$908.16 alleged by complainant, and has enclosed an account of sales which shows gross proceeds of \$1,111.50, with deductions of \$236.50 for freight, \$24.30 for cartage, \$1.29 for terminal fees, \$133.38 for commission, and \$8.60 for handling, leaving net proceeds of \$707.43. Complainant bases its claim for \$908.16 on the market price for the 86 cartons of artichokes contained in the September 13, 1984, shipment, which the Market News Service Reports for New York, New York show as \$12.00 each, for gross sales of \$1,032.00. Complainant concedes a 12% commission of \$123.84, which would leave net proceeds of \$908.16.

Respondent's answer is not verified. Therefore, neither the answer nor the attached account of sales can be given any evidentiary value. We will thus determine the amount owing for the September 13, 1984, shipment by referring to the Market News Service Reports provided by complainant. However, in complainant's calculation of the net proceeds due, it has neglected to deduct freight. In the previous shipment of September 6, 1984, consisting of 278 cartons of artichokes, respondent had deducted \$2.70 per carton for freight, to which complainant did not object. Therefore, we will deduct from the proceeds of the September 13, 1984, shipment \$2.70 per carton for freight, totalling \$232.20, leaving net proceeds of \$675.96.

Respondent's liability for all but the September 13, 1984, truck-load of artichokes has previously been determined in the June 21, 1985, Order Requiring Payment of Undisputed Amount. Respondent is also liable for the net proceeds of the September 13, 1984, shipment handled on consignment, in the amount of \$675.96. Respondent's failure to pay this sum to complainant is in violation of section 2 of the Act, for which reparation should be awarded, with interest.

ORDER

Within 30 days from the date of this order, respondent shall pay to complainant, as reparation, \$695.96, with interest thereon at the rate of 13% per annum from October 1, 1984, until paid.

Copies of this order shall be served upon the parties.

STRUBE CELERY & VEGETABLE CO., v. TRIPLE B PRODUCE DISTRIBUTORS, INC. PACA Docket No. 2-6804. Decided April 11, 1986.

Consignment transactions—Liability for payment of freight—Evidence—Effect of sworn affidavits.

Because complainant proved by a preponderance of the evidence that the transaction involved was one for the consignment of goods, the shipper was required to pay the cost of the freight as a necessary expense incidental to the transaction.

Dennis Becker, Presiding Officer.

Le Roy W. Gudgeon, Northfield, Illinois, for complainant.

William Rothstein, Nogales, Arizona, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A reply complaint was filed in which complainant sought an award of reparation in the amount of \$1,900.00 in connection with its allegedly erroneous payment to respondent of freight connected with consignment by respondent to complainant of mixed vegetables in interstate commerce.

Copies of the report of investigation made by the Department were served upon the parties. A copy of the formal complaint was served upon respondent which filed an answer thereto denying liability to complainant. Because the amount claimed as damages is less than \$15,000.00 the shortened method of procedure provided in

section 47.20 of the Rules of Practice (7 CFR 47.20) is applicable. Under this procedure the verified pleadings of the parties are a part of the evidence in the case, as is the Department's Report of Investigation. In addition the parties were given the opportunity to file evidence in the form of verified statements. Complainant filed an opening statement and statement in reply. Respondent filed an answering statement. Neither party filed a brief.

FINDINGS OF FACT

1. Complainant, Strube Celery & Vegetable Company, is a corporation with an address at 108 South Water Market, Chicago, Illinois 60608.

2. Respondent, Triple B Produce Distributors, Inc., is a corporation with an address at P.O. Box 2746 Nogales, Arizona 85621. At the time of the transaction involved in this proceeding respondent was licensed under the Act.

3. On May 14, 1984 complainant agreed to accept from respondent a truckload of mixed vegetables consisting of watermelons, peppers, and tomatos, to be handled on consignment for the account of respondent. The truckload of produce arrived at complainant's place of business on May 18, 1984. During the next several days complainant sold the goods at various prices, and on June 21, 1984, provided respondent with an account of sales showing total sales for the commodities involved of \$6,455.39, and deducting therefrom charges of \$1,155.28, leaving net sales of \$5,300.11, which it remitted to respondent. Complainant did not deduct the freight charge of \$1,900.00 from the total sales price.

4. Subsequently, the trucker, Paul Yates, demanded that complainant pay it the \$1,900.00 for freight. Complainant sought to have the bill shifted to respondent, but when confronted with the threat of a law suit for failure to pay, it paid the trucker the \$1,900.00.

5. To date respondent has not repaid complainant the \$1,900 for the freight involved in this consignment transaction.

6. A formal complaint was filed in this proceeding on December 12, 1984, which was within nine months of the time the cause of action herein arose.

DISCUSSION

The dispute in this proceeding centers around the question as to whether the shipment of mixed vegetables involved was a sale with pricing after arrival or a consignment transaction. We find, based upon a preponderance of the evidence, that the transaction involved a consignment of goods by respondent to complainant, and

that as a result of this determination respondent was liable to pay the freight involved as a necessary expense attached to the consignment.

We are drawn to our conclusion that this was a consignment transaction for several reasons. In the first place, respondent sent complainant a shipping order dated May 14, 1984, which did not contain any prices. Thereafter, after selling the commodities involved, complainant sent respondent an account of sales which carefully set forth the several prices at which the various commodities were sold. Complainant would have no reason to maintain such careful records were this a straight sale transaction. Nor would it have reason to send such an account of sales to respondent. Furthermore, respondent eventually provided an invoice which reflected prices for the three commodities involved which seemed not to reflect any true relationship to normal pricing practices, but rather appeared to be an after the fact endeavor on the part of respondent to manufacture an invoice which would closely approximate the total amount of money transmitted by complainant, without regard to freight charges. Indeed, as suggested by complainant, respondent had to put in an adjustment factor of \$21.10 to make its invoice coincide with the amount of money remitted in the account of sales. Complainant denies having received the so-called invoice from respondent in the affidavit of both its Assistant Store Sales Manager, Joe Kulinski, and its owner, Robert W. Strube. Such affidavits, having been properly sworn, must be given great weight.

We are further motivated to reach the conclusion that we have because complainant stated that it was constantly calling respondent to tell it the prices being fetched for the commodities involved. Respondent acknowledged that there were phone calls of this nature, although it characterized them otherwise. When there is a consignment involved it is common for the parties to discuss the prices that are being fetched. Therefore, complainant's version is the more consistent story.

Although there were two transactions between the two parties immediately prior in time to the one in issue here in which complainant was invoiced for the goods, complainant's explanation that while it purchased the goods involved therein it insisted on a consignment with respect to the transaction in issue here because the prior goods were of poor quality is credible under all of the circumstances. Finally, respondent did not send the invoice which closely reflected the total amount shown on the account of sales sent by complainant until after complainant provided the account of sales in early June. That respondent claims to have paid its growers based on the total price received as reflected in the account of sales

does not rise to the point under these circumstances of estopping complainant from making a full claim since respondent did not properly pursue that particular line of defense with affidavits and statements by its growers.

In view of the above we find that respondent has violated section 2 of the Act because freight is an expense properly connected to produce transactions. Therefore, it should be ordered to pay complainant \$1,900.00 as reparation, with interest at the rate of 13%.

ORDER

Within 30 days from the date of this order respondent shall pay complainant \$1,900.00 as reparation with interest thereon at the rate of 13% per annum from July 1, 1984, until paid.

Copies of this order shall be served upon the parties.

PACIFIC FARM COMPANY v. CORGAN & SON INC. PACA Docket N
2-6835. Decided April 11, 1986.

Burden of proving breach of warranty and damages—Respondent failed to sustain.

Where respondent failed to sustain its burden of proving a breach of warranty to complainant or any damages sustained as a result of any such breach, respondent is liable for the full contract prices for the eight lots of mixed fruit and vegetables admittedly received and accepted.

Andrew Stanton, Presiding Officer.

Thomas R Oliver, Newport Beach, California, for complainant.

Pro se, for respondent

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of \$29,033.80 in connection with the sale and shipment of eight trucklots of mixed fruit and vegetables to respondent in the course of interstate commerce.

A copy of the report of investigation prepared by the Department was served upon each of the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto admitting liability for \$11,090.60 but denying liability for the remaining \$18,943.20.

Although the amount claimed as damages exceeds \$15,000.00, the parties waived oral hearing. The shortened procedure provided in section 47.20 of the Rules of Practice (7 CFR § 47.20) is, therefore, applicable. Pursuant to such procedure, the report of investigation is considered to be part of the evidence, as is the verified complaint. The answer, since it is not verified, is not considered part of the evidence. The parties were given an opportunity to submit additional evidence in the form of verified statements and to file briefs. Complainant submitted an opening statement, but respondent chose not to submit any additional evidence. Neither party filed a brief.

FINDINGS OF FACT

1. Complainant, Pacific Farm Company, is a corporation whose address is 1047 M Street, Firebaugh, California.

2. Respondent, Corgan & Son Inc., is a corporation whose address is 161-162 N.Y.C. Terminal Market, Bronx, New York. At the times of the transactions involved herein, respondent was licensed under the Act.

3. On approximately April 20, July 13, 18, and 23, August 30, and September 4, and 8, 1984, complainant sold to respondent eight trucklots of mixed fruit and vegetables for f.o.b. prices totalling \$29,033.80. The individual transactions are set forth as follows:

Date of Sale	Number of Cartons	Commodity	Contract Price
April 20, 1984	832	lettuce	\$3,100.90
July 13, 1984	1092	cantaloupes, Vaughn's	5,264.10
July 18, 1984	540	honeydews, Gold Piece 5's	
	900	honeydews, Gold Pieces 6's	4,725.00
July 23, 1984	1020	honeydews, Bottoms Up	2,572.50
August 30, 1984	420	cantaloupes, Bottoms Up 18's	
		cantaloupes, Bottoms Up 23's	4,026.60
September 4, 1984	1008	cantaloupes, Bottoms Up	4,530.60
September 8, 1984	96	crenshaws, Rosy 4's	
	216	crenshaws, Rosy 5's	
	54	crenshaws, Rosy 6's	
	108	persians, Rosy 5's	2,204.10
September 8, 1984	900	honeydews, PFC	2,610.00
	Total		<u>\$29,033.80</u>

4. Complainant shipped the eight trucklots of fruits and vegetables in interstate commerce to respondent, which received and ac-

cepted them but has failed to pay any part of the agreed upon contract prices.

5. A formal complaint was filed on December 17, 1984, which was within nine months from when the causes of action herein accrued.

6. Respondent filed an answer on April 11, 1985, in which it admitted liability for \$11,090.60 of the amount alleged in the complaint, but denied liability for the remaining \$18,943.20. An Order requiring Payment of Undisputed Amount was, therefore, issued ordering respondent to pay to complainant the undisputed amount of \$11,090.60.

CONCLUSIONS

Respondent does not deny purchasing, receiving and accepting the eight loads of lettuce at issue. Respondent has submitted an unverified answer which it alleges that some of the loads were abnormally deteriorated upon arrival at its place of business, and has included inspection reports to support these allegations. Having admittedly accepted the eight loads, respondent became liable for the contract prices less any damages resulting from a breach of warranty by complainant. It is the respondent's burden to prove the breach and damages by a preponderance of the evidence. *Magic Valley Produce Inc. v. Art Kramer's Produce Buying Service Inc.*, 39 Agric. Dec. 464 (1980).

We conclude that respondent's defenses to the complaint are lacking in merit. The inspections pertaining all transactions except the September 8, 1984, shipment of crenshaw and persian melons, either show insufficient evidence of deterioration to indicate a breach of warranty, are restricted to a small portion of the load, exhibit excessively high temperatures, indicate the existence of transportation problems, or are dated far too long after shipment to be worthy of significant weight. Further, even if the inspections did reveal one or more breaches of warranty, respondent has provided no evidence of resales and, therefore, has not sustained its burden of showing damages incurred as a result of any breach. *David Nava & Sons v. Vega & Sons Produce*, 41 Agric. Dec. 991 (1982).

We have already issued an Order Requiring Payment of Undisputed Amount for \$11,090.60 of the amount alleged in the complaint. We have determined that respondent is liable for the remaining \$18,943.20, and its failure to pay this sum to complainant is a violation of section 2 of the Act, for which reparation should be awarded, with interest.

ORDER

Within 30 days from the date of this order, respondent shall pay to complainant, as reparation, \$18,943.20, with interest thereon at the rate of 13% per annum from September 1, 1984, until paid.

Copies of this order shall be served upon parties.

CAL-MEX DISTRIBUTORS INC., v. VALLEY BROKERAGE INC. PACA
Docket No. 2-6703. Decided April 14, 1986.

Failure to pay full contract price—Adjustments in price—Reparation awarded.

Complainant sold and shipped 15 truckloads of mixed vegetables to respondent which accepted and paid in accord with claimed price adjustments. Evidence was found to support some of claimed adjustments and not to support others.

George S. Whitten, Presiding Officer.

Pro se, for complainant and respondent.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks an award of reparation against respondent in the amount of \$16,363.65 in connection with the shipment of 15 trucklots of mixed vegetables which moved in foreign commerce.

A copy of the report of investigation made by the Department was served upon the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto, denying liability to complainant.

Although the amount claimed in the formal complaint exceeds \$15,000.00, the parties waived oral hearing, and accordingly, the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 CFR § 47.20) is applicable. Pursuant to this procedure, the verified pleadings of the parties are considered a part of the evidence in the case, as is the Department's report of investigation. In addition, the parties were given an opportunity to file evidence in the form of sworn statements. Complainant filed an opening statement, respondent filed an answering statement, and complainant filed a statement in reply. Complainant filed a letter, with attachments, which was considered as a brief. Respondent did not file a brief.

FINDINGS OF FACT

Complainant, Cal-Mex Distributors, Inc., is a corporation whose address is P.O. Box 1717, Chula Vista, California.

Respondent, Valley Brokerage, Inc., is a corporation whose address is 335 South Harbor Boulevard, La Habra, California. At the time of the transactions involved herein respondent was licensed under the Act.

On or about February 13, 1984, under invoice no. 6364, complainant sold to respondent, and shipped to respondent's customer, a truckload of produce containing tomatoes and eggplants. The parties have agreed during the course of this proceeding that the amount of \$50.40 is the correct amount remaining due from respondent to complainant in regard to this transaction.

On or about February 22, 1984, under invoice no. 6423, complainant sold to respondent 108 lugs of pink tomatoes at 6.00 per lug plus \$.35 per lug for freight. The tomatoes were shipped from Chula Vista, California to respondent in La Habra, California on or about the same date, and on arrival the load was found to contain 107 lugs, and to be over-ripe. Complainant and respondent agreed on an adjustment based on 107 lugs at \$5.50 per lug, plus \$.35 per lug for freight. Respondent has paid complainant the total amount of \$625.95 based on this adjustment.

On or about March 2, 1984, complainant sold to respondent, and shipped to respondent's customers the following produce, and billed respondent as follows by its invoice no. 6432: To Coast Citrus Co.: 198 flats of pink tomatoes at \$10.50, or a total of \$2,079.00; 54 lugs of pink tomatoes at \$9.50, or a total of \$513.00; plus freight at \$.35, or \$88.20, for a total of \$2,680.20; To Albertson's: 75 W/B crates of eggplants at \$6.50, or \$487.50, plus freight, or \$26.25, for a total of \$513.75; To Valley Fruit & Produce: 162 lugs of pink tomatoes at \$9.50, for \$1,539.00; 54 lugs of pink tomatoes at \$10.50, or \$567.00; 9 W/B crates of eggplants at \$5.50, or \$57.15; and freight in the amount of \$.35, or \$78.75, for a total of \$2,241.90. The grand total shown by the invoice was \$5,435.85. The 75 crates of eggplants were incorrectly invoiced at \$6.00, and complainant agreed to change the price to \$6.40 per crate, making respondent's liability for the 75 crates of eggplants \$6.25. At the close of the submission of evidence in this proceeding, on April 20, 1985, respondent paid complainant \$2,680.20 for the tomatoes shipped to Coast Citrus Co. In addition on July 20, 1985, respondent tendered to complainant, by means of a check, which also tendered payment on other invoices, payment in the correct amount of \$2,748.15 for the remaining produce sold under invoice no. 6432. However, complainant did not negotiate the

check, in part because of respondent's failure to include at that time payment for the tomatoes shipped to Coast Citrus Co. Accordingly, there remains due and owing from respondent to complainant the sum of \$2,748.15 on this invoice.

6. On or about March 4, 1984, under invoice no. 6456, complainant sold to respondent, and shipped to respondent's customers, a mixed load of tomatoes, eggplants, and bell peppers, and a lot of tomatoes. After arrival of the produce complainant and respondent agreed to an adjusted price for all of the produce of \$4,675.80. Respondent has already paid complainant this amount.

7. On or about March 8, 1984, under invoice no. 6466, complainant sold to respondent, and shipped to respondent's customers, two lots of bell peppers and one lot of eggplants having a total invoice price of \$1,726.20. After arrival of the produce complainant and respondent agreed to an adjusted price for all of the produce of \$1,438.50. Respondent has already paid complainant this amount.

8. On or about March 13, 1984, under invoice no. 6488, complainant sold to respondent, and shipped to respondent's customers, two lots of tomatoes having a total invoice price of 3,108.60. Respondent received the merchandise covered by this invoice and tendered payment to complainant in the reduced amount of \$1,280.40 on July 20, 1984, by check no. 13792. This check was not negotiated by complainant, and the entire amount of \$3,108.60 remains due from respondent to complainant.

9. On or about March 7, 1984, under invoice no. 6493, complainant sold to respondent, and shipped to respondent's customers, 84 W/B crates of eggplants at \$6.50, plus \$.35 for freight, or a total of \$575.40. Respondent's customer received the peppers, and respondent has not paid complainant the agreed purchase price.

10. On or about March 12, 1984, under invoice no. 6508, complainant sold to respondent, and shipped to respondent's customers, three lots of produce, one containing cucumbers, one eggplants, and the remaining lot cucumbers and green bell peppers, at a total invoice price of \$1,595.40. Complainant invoiced respondent for an incorrect amount of \$8.65 for 36 crates of cucumbers rather than the agreed amount of \$7.65. Respondent has paid complainant the correct amount of \$1,595.40.

11. On or about March 16, 1984, under invoice no. 6509, complainant sold to respondent, and shipped to respondent's customers, three lots of tomatoes, having a total invoice cost of \$2,036.10. Respondent's customers received the produce covered by this invoice, and respondent has tendered payment to complainant in the reduced amount of \$1,532.10 by its check no. 13792 on July 20, 1984.

his check was not negotiated by complainant, and the entire amount of \$2,036.10 is due from respondent to complainant.

12. On or about March 20, 1984, under invoice no. 6536, complainant sold to respondent, and shipped to respondent's customers, three lots of tomatoes, having a total invoice cost of \$1,126.80. After arrival of the tomatoes one lot was lowered in price by an agreement between the parties, which brought the total invoice price to \$71.70. Respondent has already paid complainant \$429.00 of this amount. The remaining amount of \$542.70 was tendered to complainant by respondent as a portion of respondent's check no. 13792 issued July 20, 1984. This check was not negotiated by complainant, in part because other items paid by the check were paid in incorrect amounts. There remains due from respondent to complainant the sum of \$542.70 on this invoice.

13. On or about March 28, 1984, under invoice no. 6568, complainant sold to respondent, and shipped to respondent's customers, two lots of tomatoes and one lot of tomatillos. The two lots of tomatoes were billed at \$3,855.00, and respondent paid complainant that amount. As to the lot of tomatillos the price was not available at time of billing, and rather than pay the freight in the amount of \$36.00, respondent secured complainant's agreement to bill the tomatillos separately. During the course of this proceeding complainant rendered the separate billing in the total amount, including freight, of \$468.00. This sum is presently due from respondent to complainant.

14. On or about March 5, 1984, under invoice no. 6572, complainant sold to respondent, and shipped to respondent's customers, one lot of eggplants having a total invoice price of \$756.00. Respondent has tendered the amount of \$756.00 to complainant for this lot of eggplants by respondent's check no. 13792 issued July 20, 1984. This check was not cashed by complainant, in part because other items paid by the check were paid in incorrect amounts. There remains due from respondent to complainant the sum of \$756.00 on this invoice.

15. On or about March 29, 1984, under invoice no. 6575, complainant sold to respondent, and shipped to respondent's customers, three lots of tomatoes for a total invoice price of \$3,297.90. After arrival of the tomatoes complainant and respondent agreed to an adjusted price of \$2,676.90. Respondent has already paid complainant this amount.

16. On or about April 17, 1984, under invoice no. 6664, complainant sold to respondent, and shipped to respondent's customer, one lot of tomatoes having an invoice price of \$332.10. Respondent's customer received the produce covered by this invoice, and re-

spondent tendered payment to complainant in the reduced amount of \$278.10 on August 8, 1984, by its check no. 13895. This check was not negotiated by complainant, and the entire amount of \$332.10 is due from respondent to complainant.

17. On or about March 18, 1984, under invoice no. 6920, complainant sold to respondent, and shipped to respondent's customer, one lot of eggplants having a total invoice price of \$407.40. Respondent has tendered complainant the entire amount due under this invoice, but such amount was included as a part of check no. 13895 issued on August 7, 1984, which included payment in an incorrect amount for another invoice. This check was not cashed by complainant, and consequently the entire amount of \$407.40 is due from respondent to complainant.

18. All of the produce in each of the transactions involved in this proceeding originated in Mexico, and was imported into California by complainant prior to shipment to respondent or respondent's customers.

19. The formal complaint was filed on September 25, 1984, which was within nine months after the causes of action herein accrued.

CONCLUSIONS

Complainant brings this action to recover amounts and balances allegedly due in connection with the sale to respondent of 15 trucklots of mixed vegetables imported by complainant from Mexico. The issues in regard to each invoice must be considered separately.

As to complainant's invoice no. 6364, the total adjusted amount due was \$4,306.20. Respondent paid complainant \$4,255.80 by check no. 13354 dated May 21, 1984. This left the sum of \$50.40 due on this invoice. Although respondent tendered this remaining amount to complainant as a part of its check no. 13895 dated August 7, 1984, such check also contained a payment on invoice no. 6920 in less than the amount claimed due by complainant, and consequently complainant refused to cash the check. There remains due from respondent to complainant as to invoice no. 6364 the sum of \$50.40.

In regard to complainant's invoice no. 6423, the original amount of the invoice was \$685.80 based on a price of \$6.00, plus \$.35 freight, for 108 lugs. The parties agree that respondent should be liable for only 107 lugs, but respondent claims that its customer rejected the tomatoes due to overripeness and that this was communicated to Bob Villalobos, president of complainant, by Larry C. Sherry, salesman for respondent. Respondent further claims that complainant's president agreed to a price adjustment of \$.50 per lug, leaving a balance due of \$625.95. Although complainant denied that any such agreement was made, complainant ac-

pted and cashed a check from respondent containing payment for 107 lugs of tomatoes. The check had attached to it a stub showing payment for invoice no. 6423 at \$625.95. At the bottom of the stub were typed the words "THE INVOICES LISTED ABOVE ARE PAID IN FULL AS PER BOB V. AND LARRY MCSHERRY." We conclude on the basis of all of the evidence that complainant agreed to the adjustment claimed by respondent and that nothing remains due to complainant on this invoice.

In relation to complainant's invoice no. 6432, by the time submission of evidence in this proceeding was completed the parties had come to an agreement on every item except the price for the 75 crates of eggplants. Respondent maintained that the invoice price of \$6.50 per crate was not in accord with the agreed price, and respondent's Larry C. McSherry asserted that upon receiving the invoice he telephoned Bob Villalobos and called his attention to the pricing error. Mr. McSherry stated that Mr. Villalobos agreed to change the amount from \$6.50 to \$6.40, and that respondent then changed the invoice and sent it back for approval. Mr. McSherry contends that the invoice was returned with a note signed by Mr. Villalobos stating that it was all right to change the invoice. A copy of the note was attached to Mr. McSherry's statement, and it simply lists a large number of invoices stating that it is okay to make changes on them. The nature of the change is not specified for any of the listed invoice numbers. Mr. Villalobos does not deny sending the note but states that the reference thereon to invoice 6432 is a typographical error and should read 6433. The lack of specificity in the note leads us to believe that it must have been sent by complainant to accompany invoices changed by respondent, and sent to complainant for approval as respondent contends. We conclude that complainant is bound by the note as it stands, and as not shown that it applies to a different invoice. Accordingly, we have found that complainant agreed to change the price on the invoice to \$6.40, and respondent is liable only for this amount. As stated in finding of fact 5, respondent's remaining liability on invoice no. 6432 amounts to \$2,748.15.

The parties dispute the original terms of sale, prices, and quantities in regard to various portions of the produce sold under invoice no. 6456. However, the quantity actually shipped is agreed upon by both parties. It is not necessary for us to discuss and decide these issues because we find that the record supports the conclusion that the parties, after arrival of the produce, agreed upon a total invoice cost for the produce in the amount \$4,675.80. Although complainant disputes this, and claims instead that the agreed amount was \$6,332.70, respondent sent complainant a check on July 6, 1984, in

the total amount of \$12,303.30, which included the amount \$4,675.80 for invoice no. 6456, and so stated on the check stub. The stub also included the words typed in all caps: "THE INVOICES LISTED ABOVE ARE PAID IN FULL". We consider complainant's cashing of this check to be adequate evidence of the settlement agreement claimed by respondent.

In regard to complainant's invoice no. 6466, respondent claims that 42 boxes of bell peppers arrived in bad condition and that such peppers were returned to complainant pursuant to agreement between the parties. Respondent also contends that the parties agreed to an adjusted invoice price of \$1,438.50. Complainant claims that it never authorized the return of the peppers, never received such peppers, and that there is no inspection report to support the peppers arriving in bad condition. The record shows that respondent sent complainant a check on April 20, 1984, in the total amount of \$8,741.30, which included the amount of \$1,438.50 for invoice no. 6466, and so stated on the check stub. The stub also included the words typed in all caps: "THE INVOICES LISTED ABOVE ARE PAID IN FULL AS PER BOB V.". We consider complainant's cashing of this check to be adequate evidence of the settlement agreement claimed by respondent.

In regard to complainant's invoice no. 6488, respondent claims that complainant shipped a quantity of tomatoes in excess of what was ordered, and that a portion of the tomatoes was of a quality below that specified when ordered. Respondent states that complainant was contacted by telephone after arrival of the tomatoes and agreed to a portion of the tomatoes being handled on an open basis. Respondent also alleges that complainant agreed that no inspection need be secured. Respondent submitted in evidence a copy of the invoice, heavily marked, alleging that it was sent to complainant and returned with complainant's okay signifying acceptance of the reduced prices noted thereon. Complainant denies all of respondent's allegations. There is no way of concluding with any certainty from the face of the marked up invoice submitted by respondent that complainant approved the price changes noted thereon. Respondent had the burden of proving by a preponderance of the evidence that complainant agreed to the adjustments claimed. We conclude on the basis of all of the evidence that respondent has not met this burden. The entire invoice amount of \$3,108.60 is now due from respondent to complainant.

Respondent asserts that the peppers covered by invoice no. 6493 were placed on an open basis with its customer with complainant's consent, after having arrived in poor condition. Respondent states that agreed with complainant on June 26, to a price of \$4.85.

Complainant denies that it ever agreed to the peppers being handled on an open basis or to an adjusted price. Respondent had the burden of proving the alleged change in the original contract terms and the alleged adjusted price. We find that respondent has failed to meet this burden by a preponderance of the evidence, and is liable to complainant for the total amount of \$575.40 on this invoice.

In regard to invoice no. 6508, respondent contends that it was incorrectly billed for \$8.65 on 36 crates of cucumbers. Complainant denies this contention, and asserts that the invoice amount is correct. However, on June 15, 1984, respondent paid complainant \$1,595.45 on invoice no. 6508, which reflected the lower price alleged by respondent to be the original agreed price. The check stub contained the words typed in all caps at the bottom: "THE ABOVE INVOICES ARE PAID IN FULL." Complainant accepted and cashed the check. We conclude that respondent has shown by a preponderance of the evidence that the original price for the 36 crates of cucumbers was \$7.65, and that payment in full has been made to complainant on this invoice.

In regard to complainant's invoice no. 6509, respondent claims that a portion of the tomatoes covered by the invoice arrived in poor condition. Respondent asserts that after arrival of the tomatoes it was agreed with complainant's president that these tomatoes would be handled on an open basis, and that subsequently complainant's president agreed to a reduced price for such tomatoes. Respondent states that a copy of the invoice was marked with the reduced price and returned to complainant's president, and that such invoice was subsequently sent back to respondent with the approving signature of complainant's president. The marked up copy of the invoice submitted by respondent reflects what appear to be initials near the bottom, but we are unable to say with any certainty that these are the initials of complainant's president, and Mr. Villalobos has denied the allegations of respondent in this regard. Respondent had the burden of proving by a preponderance of the evidence that complainant agreed to the adjustments claimed. We conclude on the basis of all of the evidence that respondent has not met this burden. The entire invoice price of \$2,036.10 is presently due from respondent to complainant.

In regard to complainant's invoice no. 6536, complainant agreed during the course of this proceeding that respondent's contention that only \$542.70 remains due is correct. Since respondent's tender of this amount was by means of a check which included other incorrect payment amounts, complainant did not negotiate the check.

The sum of \$542.70 remains due and owing from respondent to complainant in regard to this invoice.

As to invoice no. 6568, the parties agreed that the tomatillos originally on such invoice, without a price other than the cost of freight, should be rebilled. Complainant rebilled the tomatillos separately at \$468.00, including freight, and respondent has not objected to this amount. We conclude that such amount is now due and owing from respondent to complainant.

The parties are in agreement as to the amount due on invoice no. 6572, and respondent tendered this amount to complainant in its check no. 13792 issued July 20, 1984. However, since this check included other incorrect payment amounts, complainant did not cash the check. The sum of \$756.00 remains due and owing from respondent to complainant on this invoice.

As to invoice no. 6575, respondent claims that the tomatoes arrived in poor condition, and that complainant upon being contacted by respondent agreed to an adjusted price for the load of \$2,676.90. Complainant denies respondent's allegations. However, respondent sent complainant a check on July 10, 1984, in the total amount of \$6,102.90, which included the amount of \$2,676.90 for invoice no. 6575, and so stated on the stub. The check stub also included the words typed in all caps at the bottom: "THE INVOICES LISTED ABOVE ARE PAID IN FULL." We consider complainant's cashing of this check to be adequate evidence of the adjustment claimed by respondent.

As to invoice no. 6664, respondent claims that the price shown on the invoice was incorrect. Respondent states that the agreement of complainant was secured by telephone to the reduced price of \$278.10, and that the invoice was so marked in return for complainant's approval. Respondent alleges that the invoice was approved by complainant and returned with Bob Villalobos' initials evidencing such approval. Complainant denies these contentions. Respondent has not furnished any substantive evidence showing that the initials on the invoice belong to Bob Villalobos, and we conclude that respondent has failed to prove that the reduced price is the correct amount. There remains due from respondent to complainant the sum of \$332.10 on this invoice.

In regard to the last of complainant's invoices, no. 6920, the parties have agreed that the correct amount due is \$407.40. Since respondent's tender of this amount was by means of a check which included another incorrect payment amount, complainant did not negotiate the check. The sum of \$407.40 remains due from respondent to complainant as to this invoice.

The total amount which we have found to be still due and owing from respondent to complainant is \$11,024.85. Respondent's failure to pay complainant such amount is a violation of section 2 of the Act for which reparation should be awarded to complainant with interest.

ORDER

Within thirty days from the date of this order, respondent shall pay to complainant, as reparation, \$11,024.85, with interest thereon at the rate of 13 percent per annum from May 1, 1984, until paid.

Copies of this order shall be served upon the parties.

CLARENCE W. ROBINSON d/b/a ROBINSON FARMS, v. MICHAEL BROTHERS, INC. PACA Docket No. 2-6776. Decided April 14, 1986.

Rejection—no contest

Respondent rejected a consignment of melons bought from complainant following Federal inspection indicating defects. The rejection was not contested by complainant. Complaint dismissed.

Dennis Becker, Presiding Officer.

Thomas R. Oliver, Newport Beach, California, for complainant.

Pro se, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant sought an award of reparation in the amount of \$3,539.33 in connection with the sale of a truckload of honeydew melons in interstate commerce.

Copies of the report of investigation made by the Department were served upon the parties. A copy of the formal complaint was served upon respondent which filed an answer thereto denying liability to complainant. Because the amount claimed as damages was less than \$15,000.00, the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 CFR 47.20) is applicable. Under this procedure the verified pleadings of the parties are taken as true, as is the evidence in the case, as is the Department's report of investigation. In addition, the parties were given the opportunity to present evidence in the form of verified statements. Complainant

opening statement, and respondent filed an answering statement. In addition, complainant filed a brief.

FINDINGS OF FACT

1. Complainant, Clarence W. Robinson is an individual doing business as Robinson Farms, with an address at P.O. Box 1064, Blythe, California 92226.

2. Respondent, Michael Brothers, Inc., is a corporation with an address at Produce Building, 38 Harris Avenue, Providence, Rhode Island 02903. At the time of the transaction involved in this proceeding respondent was licensed under the Act.

3. On October 4, 1983, complainant sold to respondent 120 cartons of 5s honeydew melons at \$3.25 per carton for a total price of \$390.00, 120 cartons of 6s honeydew melons at \$3.25 per carton for a total price of \$390.00, and 1,140 cartons of 8s honeydew melons at \$2.25 per carton for a total price of \$2,565.00, plus palletizing at \$.25 per carton for a total price of \$345.00, and a thermogard thermometer for \$22.50, for a total contract price of \$3,712.50, f.o.b. Tom Lange Co., Inc., of Springfield, Illinois acted as the broker for the transaction. The honeydew melons were shipped on October 4, 1983, in interstate commerce, and arrived at respondent's place of business on October 11, 1983, where they were inspected by the federal inspection service.

4. The federal inspection referred to in paragraph 3, above, occurred on October 11, 1983. The melons were still on the truck when the inspection was held at 9:15 a.m. The inspection showed in pertinent part as follows:

Condition of Pack:	Tight to fairly tight.
Quality:	Mature, many clean and generally well formed. Grade defects range 2 to 7 melons (25 to 87%) per carton, average 52% caked on dirt, scars, cuts and misshapen.
Grade:	Fails to grade U.S. No. 1, account of grade defects.

5. As a result of the inspection respondent rejected the load of honeydew melons, and notified the broker that it was doing so. Tom Lange Company notified complainant at 11:00 a.m. on October 11, 1983, that respondent had rejected the load. On complainant's instructions the load was consigned to Paramount Produce, Inc., lo-

cated in Chelsea, Massachusetts, where it was sold, and an account of sales was provided with net proceeds to complainant of \$173.17.

6. When the truckload of melons arrived at Paramount's place of business Paramount notified complainant that 266 cartons of melons were not on the truck. Complainant, on October 13, 1983, at 12:38 p.m., sent a telegram to respondent which stated as follows:

We are not accepting your unjustified rejection of Mar 5422 shipped on 10/4/83 and notified by Tom Lange Company of Salinas, California 9 am 10/12/83. You had taken off 266 cartons of honeydews therefore you did accept the load. We expect full invoice less any proven damages due to breach of contract.

7. A formal complaint was filed in this proceeding on February 28, 1984, which was within nine months of the time of cause of action herein accrued.

DISCUSSION

Although the respondent contends that the contract provided for the delivery of U.S. No. 1 honeydews, and complainant is inconsistent in its statements as to whether there was a U.S. No. 1 or no grade contract, this issue is immaterial because it is superseded by the overriding question as to whether there was a proper rejection of the truckload of melons. We find upon our evaluation of all of the evidence in this proceeding that respondent properly rejected the truckload, and therefore, must prevail.

Complainant contends that respondent accepted the honeydew melons because it partially unloaded the truck by taking 266 cartons of melons off the truck after the inspection occurred and before the melons went to Paramount Produce, Inc., of Chelsea, Massachusetts, on consignment at complainant's instructions. Complainant contends that the partial unloading of the melons constitutes acceptance of the entire truckload. Unfortunately for complainant it has not proved that respondent was responsible for unloading the 266 cartons from the truck. The evidence reflects that the federal inspection occurred on October 11, 1983, at 9:00 a.m. The evidence further reflects, as shown by the broker's memorandum that complainant was notified on October 11, 1983, at 11:00 a.m. that respondent had rejected the truckload because of the grade defects found by the federal inspection. Therefore, we reject complainant's claim that it was not notified until October 12, 1983, because the statement of an ostensibly neutral third party must be given great weight. See *Homestead Tomato Packing Co. v. Mims*

Produce, Inc., 43 Agric. Dec. ____ (1984); *Kern Ridge Growers v. T. J. Power & Co.*, 48 Agric. Dec. 425 (1981).

The actions of complainant show clearly that it did not contest the rejection of the load by respondent on October 11, 1983. It was at the direction of complainant on that date that the goods were shipped to Paramount for handling on consignment. That being the case it was complainant's responsibility for any unloading which may have occurred while the goods were in transit from respondent's place of business to Paramount's place of business. There is no evidence to reflect that respondent unloaded any of the goods after it rejected the truckload. We are not much impressed by the statement of the truck driver that the goods were fully intact when he took them from respondent's place of business to that of Paramount since the statement is partially self-serving. It is complainant's burden of proof to show that respondent acted improperly after it rejected the goods, and complainant has offered no solid proof to show that it was respondent rather than the truck driver, Paramount or someone else which took off the 266 cartons involved. Neither are we impressed by complainant's telegram to respondent at 12:38 p.m. on October 13, 1983, indicating that it rescinded its acceptance of respondent's rejection. It is more likely because of the short distance between Providence, Rhode Island, and Chelsea, Massachusetts that the goods arrived at Paramount's place of business on October 11, 1983, and certainly no later than the morning of October 12, 1983. It appears to us that complainant was late in complaining to respondent as to the loss of 266 cartons, in any event.

In view of the above the complaint must be dismissed.

ORDER

The complaint in this proceeding is dismissed.

Copies of this order shall be served upon the parties.

JOHN LIVACICH PRODUCE INC., a/t/a VISTA-WATSONVILLE SALES, v.
CARNIVAL FRUIT CO. INC. PACA Docket No. 2-6874. Decided
April 14, 1986.

Burden of proof to show breach of warranty and damages—on respondent. Breach of warranty by complainant. Damages proved by respondent. Payment to suppliers by complainant made while aware of condition problems.
Respondent sustained its burden of proving complainant's breach of warranty of suitable shipping condition on the load of strawberries respondent admittedly accepted, and respondent's damages resulting from the breach. As respondent's dam-

ages equal the contract price, respondent is without liability. Respondent is not responsible for complainant's payment to its suppliers made while complainant was aware of the condition problems of the strawberries.

Andrew Stanton, Presiding Officer.

Matthew M. McTierney, Newport Beach, California, for complainant.

Pro se, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of \$1,901.50, in connection with the sale and shipment of a trucklot of strawberries to respondent in interstate commerce.

A copy of the report of investigation prepared by the Department was served upon each of the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto, denying liability.

Since the amount claimed as damages does not exceed \$15,000.00, the shortened procedure provided in section 47.20 of the Rules of Practice (7 CFR § 47.20) is applicable. Pursuant to such procedure, the report of investigation is considered to be part of the evidence, as are the verified complaint and answer. The parties were given an opportunity to submit additional evidence in the form of verified statements and to file briefs. Complainant submitted an opening statement but respondent chose not to submit any additional evidence. Complainant also filed a brief.

FINDINGS OF FACT

1. Complainant, John Livacich Produce, Inc. a/t/a Vista-Watsonville Sales, is a corporation whose address is P.O. Box 5519, San Bernardino, California.

2. Respondent, Carnival Fruit Co., Inc., is a corporation whose address 475 N.E. 185th St., Miami, Florida. At the time of the transaction involved herein, respondent was licensed under the Act.

3. On approximately May 19, 1984, complainant sold to respondent 380 trays of strawberries at \$4.00 per tray plus \$.60 per tray for cooling, \$74.00 for tectrol, \$22.50 for a Ryan recorder, and \$.18 per tray for brokerage, for a total f.o.b. contract price of \$1,901.50. The broker in this proceeding, through whom both parties communicated, was The Tobl Company, Inc., Miami, Florida, represented by their employee, Gene Meyers.

4. The strawberries were shipped in interstate commerce to respondent, where they arrived on May 23, 1984, and were federally inspected. The inspection found as follows, in relevant part:

VARIOUS CONTAINERS Range 40° To 42°

SHIPPER: Vista Watsonville Sales

STRAWBERRIES—"Vista 112 Dry Pints"

Applicant States 380 flats.

CONDITION: Berries mostly ripe and firm. Calyxes generally fresh and green, few turning brown. Ranges 5 to 20%, average 20% damage by bruising. Decay ranges 17 to 75%, average, 34% Rhizopus Rot and Gray Mold Rot each in various stages.

5. On May 23, 1984, after receiving the results of the inspection, respondent immediately contacted Mr. Meyers, informed him of the results, and asked him to notify complainant that respondent might only be able to return freight costs. Mr. Meyers then contacted complainant and conveyed the information given to him by respondent. On that same date, Mr. Meyers issued an "Adjustment Form", on which he noted the inspection results, respondent's statement that it would try to return freight, and that he had reported respondent's statement to complainant.

6. Respondent has not paid any part of the contract price to complainant.

7. An informal complaint was filed on January 2, 1985, which was within nine months from when the alleged cause of action herein accrued. A formal complaint was filed on April 29, 1985.

CONCLUSIONS

Respondent claims that the load of strawberries it admittedly received and accepted was found by a federal inspection to be in very poor condition. It therefore told the broker to inform complainant that it might not be able to recover on resale anything in excess of its freight expense. Complainant contends that transportation conditions were abnormal. Complainant asserts further that it never received notice of the condition problems until November 1984, when it received a copy of the May 23, 1984, federal inspection. Complainant states that prior to receiving notice, it made full payment to its suppliers, and therefore demands payment of the entire contract price from respondent.

As this was an f.o.b. sale, respondent, having admittedly accepted the strawberries, became obligated to pay complainant the agreed

upon contract price, less damages resulting from any breach of warranty by complainant. Respondent has the burden of proving the breach and resulting damages by a preponderance of the evidence. *Farm Market Service Inc. v. Albertson's Inc.*, 42 Agric. Dec. 429 (1983).

The May 23, 1984, inspection (Finding of Fact 4) clearly reveals that the strawberries were in very poor condition when they arrived at the respondent's place of business. Although pulp temperatures were slightly high, this could not have accounted for the 34% rot found by the inspection. We conclude, therefore, that there was a breach of complainant's suitable shipping condition warranty (7 CFR § 46.43(j)). Respondent was thus entitled to recover damages consisting of the difference between the actual value of the strawberries at the time and place of acceptance and the value they would have had if they had been as warranted. *Homestead Tomato Packing Co., Inc. v. Austin J. Merkel Co., Inc.*, 40 Agric. Dec. 1587 (1981). The actual value is usually determined by the results of a prompt and proper resale. Respondent claims that it resold the strawberries but recovered only enough to pay for its freight expense of \$1.20 per tray, or \$456.00. Considering the extremely high level of decay shown by the federal inspection, we believe that respondent was fortunate to have recovered even \$456.00. We thus conclude that the resale was indeed prompt and proper, even in the absence of an account of sales. *Farm Market Service, Inc. v. Albertson's Inc. a/t/a Southco Division*, 42 Agric. Dec. 429 (1983). For the value of the strawberries if they had been as warranted, we will use the contract price plus freight, which consists of \$2,357.50. Respondent's damages are the difference between \$2,357.50 and \$456.00, or \$1,901.50, which is equivalent to the contract price. Therefore, respondent has not incurred any liability with respect to this transaction.

Complainant's claim that it did not receive notice of the condition problems until November 1984, by which time it had already paid its suppliers, does not cause us to alter our conclusion that respondent is without liability. Complainant's claim is flatly contradicted by the broker, who says complainant was informed of the problems on May 23, 1984 (Finding of Fact 5), the date the strawberries arrived and were inspected. Assuming the truth of the broker's statement, which we have no reason to doubt, complainant apparently paid its suppliers while being aware of the condition problems of the strawberries. Respondent cannot be held responsible for this decision.

Accordingly, the complaint must be dismissed.

ORDER

The complaint is hereby dismissed.

Copies of this order shall be served upon the parties.

BIANCHI & SONS PACKING CO., v. G & J PRODUCE INC. PACA Docket
No. 2-6930. Decided April 14, 1986.

Evidence effect of unsworn pleading. Good delivery standards for tomatoes.

Inspection report as *prima facie* evidence.

Where respondent provided unsworn answer its claim backed evidentiary value, as a result of which the only evidence which could be considered regarding its claim the tomatoes did not make good delivery was a federal inspection certificate. However, the certificate showed the tomatoes did make good delivery—hence, complainant was entitled to the full purchase price.

Dennis Becker, Presiding Officer.

Thomas R. Oliveri, for complainant.

Pro se, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant sought an award of reparation in the amount of \$7,193.70 in connection with the sale of a truckload of tomatoes in interstate commerce.

Copies of the report of investigation made by the Department were served upon the parties. A copy of the formal complaint was served upon respondent which filed an unsworn answer thereto denying liability to complainant. Because the amount claimed as damages is less than \$15,000.00 the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 CFR 47.20) is applicable. Under this procedure the verified pleadings of the parties are part of the evidence in the case as is the Department's report of investigation. In addition the parties were given the opportunity to file evidence in the form of verified statements. Complainant filed an opening statement. Complainant also filed a brief.

FINDINGS OF FACT

1. Complainant Bianchi & Sons Packing Company, is a corporation doing business at P.O. Box 190, Merced, California 95341.

2. Respondent, G. & J. Produce, Inc., is a corporation with an address at Suite 106, 2520 Airline Drive, Houston, Texas 77009. At the time of the transaction involved in this proceeding respondent was licensed under the Act.

3. On June 21, 1984, complainant sold to respondent 1,728 cartons of tomatoes at \$4.00 per carton plus \$.15 per carton for palletizing, and \$22.50 for a Temperature Recorder for a total contract price of \$7,193.70, f.o.b. The tomatoes were shipped on that date in interstate commerce, and were received and accepted by respondent on June 24, 1984.

4. A federal inspection was held with respect to the load of tomatoes on June 25, 1984. It showed in pertinent part with respect to condition as follows:

Average approximately 30% turning or pink. 70% light red or red. Average 2% decay. From 2 to 22% in most samples, many none average 6% damage by bruising including 5% seirous [sic] damage and including 2% very serious damage scattered throughout pack and lot.

The percentage of condition defects was within tolerance for U.S. No. 1 tomatoes at point of destination.

5. A formal complaint was filed in this proceeding on April 22, 1985. An informal complaint was filed on January 24, 1985, which was within nine months of the time the cause of action herein accrued.

DISCUSSION

There is no issue as to whether the truckload of tomatoes was shipped to respondent by complainant, and received and accepted by respondent upon delivery. Respondent filed a one paragraph Answer which was not sworn, and therefore, which has no evidentiary value. *Frank W. Prillwitz, Jr. v. Sheehan Produce*, 19 Agric. Dec. 1213 (1960); *The Garin Co. v. Affiliated Foods, Inc.*, 43 Agric. Dec. ____ (1984). Respondent provided no other evidence with the exception of a federal inspection certificate reflecting an inspection which occurred on June 25, 1984. That inspection showed 10% condition defects with respect to the truckload of tomatoes, which is within the tolerance for tomatoes at destination. See 7 CFR 51.1861(a)(2). Such being the case we have no alternative other than to conclude that the tomatoes made good delivery, and that complainant is entitled to recover the full purchase price of the truckload. In view of the above we find that respondent has violated section 2 of the Act, and that reparation should be awarded to complainant, with interest thereon in the total amount of \$7,193.70.

ORDER

Within thirty days from the date of this order respondent shall pay to complainant \$7,193.70, with interest thereon at the rate of 13 percent per annum from August 1, 1984, until paid.

Copies of this order shall be served upon the parties.

CORKY FOODS CORPORATION *v.* S & S PRODUCE CO., INC. PACA
Docket No. 2-6941. Decided April 14, 1986.

Deferred billing—Market News Reports as evidence of price—Evidence—

Statement of broker—Evidence—invoices showing prices of other transactions.

Where parties agreed to deferred billing with actual price to be determined later based upon market price, best evidence of market price was shown by prices paid for similar transactions during the same period, plus the broker's statement, rather than conflicting prices shown in Market News Reports.

Dennis Becker, Presiding Officer.

Pro se, for complainant and respondent.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant sought an award of reparation in the amount of \$12,731.35, in connection with the sale of a truckload of tomatoes in interstate commerce.

Copies of the report of investigation made by the Department were served upon the parties. A copy of the formal complaint was served upon respondent which filed an answer thereto in which it admitted it owed an additional \$9,563.35, leaving for resolution \$3,168.00, respondent having paid the additional \$9,563.35. Because the amount claimed as damages is less than \$15,000.00 the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 CFR 47.20) is applicable. Under this procedure the verified pleadings of the parties are part of the evidence in the case as is the Department's report of investigation. In addition the parties were given the opportunity to file evidence in the form of verified statements. Complainant filed an opening statement and respondent filed an answering statement. Although given an opportunity to do so neither party filed a brief.

FINDINGS OF FACT

1. Complainant, Corky Foods Corporation, is a corporation with address at 3452 West Boynton Beach Boulevard, Suite 4, Boynton Beach, Florida 33436.
2. Respondent, S & S Produce, Co., Inc., is a corporation with an address at Louisville Produce Terminal, Units 8 and 10, Louisville, Kentucky 40218. At the time of the transaction involved in this proceeding respondent was licensed under the Act.
3. On January 19, 1985, complainant sold to respondent 432 25 pound units of 5×6 tomatoes, 1,008 25 pound units of 6×6 tomatoes, and 140 25 pound units of 6×7 tomatoes, f.o.b., with the entire truckload to be billed at market price at a later time. The tomatoes were shipped on that date to respondent, and were received and accepted by respondent on or about January 22, 1985. At Adams, Bonita Springs, Florida, acted as the broker with respect to this transaction.
4. Because of a freeze in Florida the market for tomatoes in the middle of January 1985 was very unsettled. As a result the parties agreed through the broker that pricing would be deferred with billing at market price to occur at a later, unspecified date. The Market News for Cincinnati, Ohio for January 23, 1985, showed that the market for tomatoes was unsettled, and provided no prices. The Market News for the Southeastern United States for January 24, 1985, showed the prices that complainant sought to charge respondent, namely \$19.00 for 5×6 tomatoes, \$17.00 for 6×6 tomatoes, and \$15.00 for 6×7 tomatoes. Complainant issued its billing based upon that Market News report. Although the prices for tomatoes were very high on Wednesday, January 23, 1985, they dropped rapidly from that date until the end of the week. During that week other companies charged less than complainant for similar tomatoes, generally charging the price that respondent seeks to pay in this proceeding, namely \$16.00 for the 5×6 tomatoes, \$14.00 for the 6×6 and \$12.00 for the 6×7 tomatoes. There was never a meeting of the minds between the parties as to what was an appropriate price for the tomatoes.
5. Respondent provided an account of sales which show that it netted on resale much less than the prices it offered to pay complainant for the tomatoes involved in this proceeding.
6. A formal complaint was filed on April 10, 1985, which was within nine months of the time the cause of action herein aroused.

DISCUSSION

The dispute in this proceeding arises because there was a very unsettled market for Florida tomatoes in mid January, 1985 as a

result of a freeze in that state. Complainant seeks to derive the highest price it can based upon federal Market News Reports for the Southeastern United States for the period involved. Respondent, on the other hand, seeks to pay a lesser price based upon its understanding as to what was the true market price for tomatoes during more than a one day period of time for Florida tomatoes. It offered in evidence invoices and brokers' memoranda showing prices which other sellers of tomatoes were charging their customers during the week of January 19 through 25, 1985. Respondent acknowledged that it owed complainant all but \$3.00 of the price originally billed by complainant, and paid that amount, which came to \$22,989.60, including palletizing at \$.15 per carton. Respondent claims, and complainant does not contest, that it was granted \$1.00 allowance for every carton of tomatoes sold. Therefore, there is left for resolution a differential of \$2.00 per carton between the price billed by complainant and the price offered by respondent.

Because there was no meeting of the minds as to the actual price to be paid, we must look to extrinsic evidence to determine what price the tomatoes should have fetched. In this instance the best evidence is the invoices submitted by respondent showing prices charged by other sellers of tomatoes during the pertinent period of time. There being no indication that the billing at market was to be on a specific day, such as the day of arrival, which was January 22, 1985, it would be inappropriate to accept complainant's billing based upon prices quoted in the Market News on January 23, 1985, which appear to be the highest prices quoted for Florida tomatoes during that week.

We find, based upon a preponderance of the evidence, that the prices offered by respondent, and which it eventually paid, more nearly reflects the true market price for Florida tomatoes during the week of January 19 through 25, 1985. Our conclusion in this regard is bolstered by the statement of Pat Adams, of Adams Brokerage, the broker for the transaction involved herein, who said in a letter to the Department of Agriculture dated June 4, 1985:

Concerning the load of tomatoes I purchased for S & S Produce, Co., in Louisville, Ky. on Jan 19th 1985. The tomatoes was loaded on an open market basis from Corky Foods Corp. with the understanding they would be billed at market price. The market came out on Wednesday with 5x6 \$16.00 6x6 \$14.00 6x7 \$12.00 but this market price didn't hold and by the end of that week you can buy the same tomatoes a lot less.

The same day Corky Foods Came out with \$18.00-\$16.00-\$14.00 this price was way out of market range, I know of no other shipper who was getting that kind of money for tomatoes on such a market.

After (3) three weeks of trying to work out a fair price I was unable too, So S & S Prod. was forced to take other actions,

In view of the statement by the broker as reinforced by broker's memos and other invoices we cannot conclude other than that the price charged by Corky was too high, and that the price offered by respondent was appropriate.

In view of the above the complaint in this proceeding must be dismissed.

ORDER

The complaint in this proceeding is dismissed.

Copies of this order shall be served upon the parties.

ALTON H. ALLEN and JOHN M. COELHO d/b/a SUNSET STRAWBERRY GROWERS, v. V.F. LANASA, INC. PACA Docket No. 2-6686. Decided April 17, 1986.

Breach of contract. Suitable shipping condition. Modification of contract, failure to object. Dismissal.

Where respondent accepted a shipment of strawberries from the complainant, respondent had the burden of proving that the goods failed to meet contract specifications. Upon demonstration by the respondent that the goods were inferior, respondent was only liable to complainant for the value of goods received.

Stephen J. Luparello, Presiding Officer

Thomas R. Oliveri, Newport Beach, California, for complainant

Pro se, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499 *et seq.*). A timely complaint was filed in which complainant seeks a reparation award in the amount of \$2,476.70 in connection with a shipment of strawberries in interstate commerce.

A copy of the report of investigation prepared by the Department was served upon each of the parties. A copy of the formal complaint was served upon the respondent which filed an answer thereto (also entitled "complaint") denying liability to the complainant. The amount claimed in the formal complaint being less than \$15,000, the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 CFR § 47.20) is applicable. Pursuant to this procedure, the verified pleadings of the parties are considered a part of the evidence in this case, as is the Department's report of investigation. The parties were given the opportunity to file additional evidence in the form of verified statements as well as briefs. Complainant submitted an opening statement and a brief. Respondent elected not to submit any additional evidence.

FINDINGS OF FACT

1. Complainant Sunset Strawberry Growers is a partnership composed of Alton H. Allen and John M. Coelho, whose address is 2400 West Main St., Santa Maria, California 93453. At the time of the transaction involved herein, complainant was licensed under the Act.

2. Respondent V. F. Lanasa, Inc., is a corporation whose address is 317 Hull St., Richmond, Virginia 23224. At the time of the transaction involved herein, respondent was licensed under the Act.

3. On May 17, 1984, complainant contracted to sell respondent 1,152 trays of strawberries. The contract price was \$4.50 per tray, plus .60 per tray cooling, .15 per tray brokerage fee and a \$22.50 fee for a Ryan recorder, for a total invoice price of \$6,070.50 f.o.b. The strawberries were shipped in interstate commerce from California to Richmond, Virginia, on May 17, 1984, and arrived at respondent's place of business on May 22, 1984.

4. Respondent inspected the strawberries upon arrival and detected heavy decay and gray mold rot. A federal inspection conducted later on May 22 revealed, in pertinent part: "From 5 to 25%, average 17% decay, mainly Gray Mold Rot and Rhizopus Rot in various stages." The inspection also determined the pulp temperature of the strawberries to be between 46° and 48°.

5. Respondent inspected the strawberries and immediately notified the complainant of their condition. The parties, through a broker, Punelli-Lazopoulos, Inc., agreed that the respondent should sell the load and an adjustment to the contract price would be made at a later date. Complainant now states that he would not have agreed to the adjustment had he known the content of the federal inspection.

6. Respondent has paid complainant \$3,593.80.

7. A formal complaint was filed on this matter on September 25, 1984, within nine months of the time the cause of action herein accrued.

CONCLUSIONS

This proceeding involves a dispute in which the complainant claims that he fulfilled the terms of his contract with the respondent, and the respondent claims that the subject of the contract, a shipment of strawberries, did not meet contract specifications, and therefore that it has rightfully withheld full payment. It is the complainant's contention that any damage to the strawberries occurred after the risk of loss and responsibility had shifted to the respondent, thereby entitling the complainant to the full contract price of \$6,070.50. As the proponent of a breach of contract claim, the complainant generally carries the burden of proof to a preponderance of the evidence. See *New York Trade Assoc. v. Sidney Sandler*, 32 Agric. Dec. 702, 705 (1973). However, since the respondent accepted the goods, the burden of proving that the complainant failed to tender the goods in suitable shipping condition falls on the respondent. See U.C.C. § 2-607(4); *Roy Rucker Produce v. J. P. Miller Wholesale Produce*, 33 Agric. Dec. 871, 873 (1974). Based upon our analysis of the evidence submitted, we conclude that the respondent should prevail.

The terms of the contract are not in dispute. The contract called for the purchase by respondent of 1,152 trays of strawberries on an f.o.b. basis, at a price of \$4.50 per tray, plus .60 per tray cooling, .15 per tray brokerage and \$22.50 for a Ryan recorder, for a total contract price of \$6,070.50. The evidence shows that the strawberries were shipped in interstate commerce on May 17, 1984, and arrived at the respondent's place of business on May 22, 1984. The evidence further demonstrates that when the goods arrived at their destination point of Richmond, Virginia, the respondent conducted an inspection of the goods and determined that due to extensive decay and gray mold rot, the goods did not conform to contract specifications. The parties, through the brokerage firm of Punelli-Lazopoulos, Inc., agreed that the respondent should sell the strawberries and that the parties would work out a price adjustment at a later date.

The complainant bases his breach of contract claim on the findings of a federal inspection performed on May 22. The inspection read in part that the average pulp temperature of the strawberries was 46° to 48°F, considerably higher than the 34° to 36° range dictated in the bill of lading. It is the position of the complainant that the agreement to modify the contract price was based on misinfor-

mation supplied by the respondent as to the handling of the strawberries and therefore is void. The complainant contends that the pulp temperatures indicated in the federal inspection are proof that the decay and rot occurred after the strawberries were placed in the possession of the trucker, that is, after the risk of damage in transit had shifted to the respondent. The complainant, relying on this evidence, contends that he fulfilled his obligation under the contract in that he delivered the goods to the trucker in suitable shipping condition as per section 46.43(j) of the regulations (7 CFR § 46.43(j)) and the terms of the f.o.b. contract. Noting that, he demands full payment.

Evidence submitted by the respondent on the issue of breach of warranty of suitable shipping condition included the federal inspection report and the temperature reading taken by the Ryan recorder. The inspection showed that the strawberries averaged 17% decay, well in excess of the acceptable delivery standard. Further, the Ryan recorder indicated that the temperature of the truck's cooling unit was maintained at approximately 36° for the duration of the trip, with predictably warmer readings during the loading and unloading stages. The Ryan recorder evidence appears to support the contention that the strawberries were shipped in accordance with the instructions provided by the complainant in the bill of lading. It must be presumed therefore that any damage or decay to the shipment must have existed prior to the tender of the strawberries to the trucker. We are particularly drawn to this conclusion because of the temperatures shown on the Ryan. The high pulp temperatures could easily result from the percentage of decay in the load. In light of the fact that the complainant offered no evidence as to the condition of the strawberries prior to shipment, the evidence submitted by the respondent is sufficiently substantial to conclude that the complainant did not deliver the goods in suitable shipping condition.

Even if the decay occurred during transit respondent would prevail since complainant agreed to modify the contract. When discussions were held complainant was required to ask all pertinent questions regarding the load. Absent misrepresentation or fraud on the part of respondent, any misunderstanding resulting in a modification is not actionable. *Walters Produce, Inc. v. Francis Produce Co.*, 44 Agric. Dec. ____ (1985).

The complainant's failure to deliver the goods in suitable shipping condition constitutes a breach of the contract. See *Garin Co. v. Gelman Commission Co.*, 32 Agric. Dec. 223, 227 (1973). The standard formula for determining damages when the buyer has accepted the goods is the difference at the time and place of acceptance be-

tween the value of the goods accepted and the value of goods conforming to the contract. See U.C.C. § 2-714; *Freshpict Fruits v. H. R. Bushman & Son*, 29 Agric. Dec. 71, 79 (1970). The method for assessing the value of conforming goods is the f.o.b. contract price plus expenses. See *Norfolk Banana Distributors, Inc. v. Standard Fruit & Steamship Co.*, 34 Agri. Dec. 413, 415 (1975). The contract price was \$5,184.00 (\$4.50 per tray multiplied 1,152 trays), plus \$691.20 for cooling costs and \$172.80 for brokerage fees, giving a total of \$6,048.00 as the value of conforming goods. In determining the value of the goods accepted, the only evidence available is the agreement between the parties that a fair adjustment would be worked out at a future date. From the pleadings, it appears that the complainant had no objection to the assessment of \$3.00 per tray as a reasonable price for strawberries in such decayed condition. Using the \$3.00 figure, the value of the goods accepted was \$3,456. Subtracting the value of the accepted goods from the value of conforming goods results in a difference of \$2,592.00, which represents respondent's damages.

The complainant contends and the evidence shows that the respondent remitted \$3,593.80 in payment for the strawberries, \$2,476.70 less than the original contract price. Due to the breach of contract by the complainant, however, the respondent is responsible only for the difference between the original contract price and the damages resulting from the breach. Since that figure is less than the amount remitted by the respondent to the complainant, the complainant has received all to which he is legally entitled.

ORDER

The complaint is hereby dismissed.

Copies of this order shall be served upon the parties.

PURE GOLD, INC., v. VICTOR'S PRODUCE INC. PACA Docket No. 2-6944. Decided April 24, 1986.

Acceptance manifested by act of unloading. Burden of proof as to damages.

Suitable shipping condition. Tolerances at destination.

Because respondent unloaded a truckload of oranges it accepted them; therefore, it had the burden to show it suffered damages because of a breach of complainant's suitable shipping condition warranty. It could not do so because the amount of condition defects was within regulatory tolerances for oranges at destination.

Dennis Becker, Presiding Officer.

Thomas R. Oliveri, Newport Beach, California, for complainant.

Pro se, for respondent

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*) A timely complaint was filed in which complainant sought an award of reparation in the amount of \$1,861.00 in connection with the sale of the truckload of naval oranges in interstate commerce.

Copies of the report of investigation made by the Department were served upon the parties. A copy of the formal complaint was served upon respondent which filed an answer in which it denied the allegations of the complaint. Because the amount claimed as damages is less than \$15,000 the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 CFR 47.20) is applicable. Under this procedure the verified pleadings of the parties are a part of the evidence in the case as is the Department's report of investigation. In addition the parties were given the opportunity to file evidence in the form of verified statements. Neither party did so. However, complainant filed a brief.

FINDINGS OF FACT

1. Complainant, Pure Gold, Inc., is a corporation with an address at P.O. Box 40, Redlands, California 92373.

2. Respondent, Victor's Produce Inc., is a corporation with an address at 3701 "D" East Alameda, El Paso, Texas 79905. At the time of the transaction involved in this proceeding respondent was licensed under the Act.

3. On December 28, 1984, complainant sold to respondent 1,100 cartons of naval oranges at \$4.50 per carton for a total contract price of \$4,950.00, f.o.b. The transaction was brokered by South Central Produce Brokers, San Antonio, Texas. The oranges were shipped on December 28, 1984, and were received and accepted by respondent on or about January 1, 1985.

4. On January 2, 1985, the oranges were subjected to a federal inspection at respondent's place of business. That inspection showed in pertinent part as follows insofar as condition was concerned:

Mostly firm. In most samples from 8 to 24%, in some none, average 11% damage by skin breakdown, mostly pitted. Average 1% decay.

5. Respondent has paid complainant \$3,089.00 of the \$4,950.00 contract price, leaving \$1,861.00 unpaid.

6. A formal complaint was filed on June 3, 1985, which was within nine months of the time the cause of action herein accrued.

DISCUSSION

Because respondent unloaded the oranges from the truck and took them into its place of business, it accepted the oranges. *Theron Hooker Company v. Ben Gatz Co.*, 30 Agric. Dec. 1109, 1112 (1971); *Sunfresh Distributing Company v. Frank Dania Company*, 43 Agric. Dec. ____ (1984). As a result it has the burden of proof to show that it suffered damages because of a breach of contract on the part of complainant. *Rydell California Potato Co. v. The Kaufman-Brown Potato Company*, 16 Agric. Dec. 1055 (1957). Respondent has failed to sustain its burden of proof in this regard.

The sole issue in this case is whether the percentage of condition defects, namely 11% damage by skin breakdown and 1% decay at destination is so great as to lead us to the conclusion that complainant's warranty of suitable shipping condition was breached. Complainant claims that the oranges were sold as U.S. No. 1. Respondent claims that they were sold as U.S. Fancy. It makes no difference which of the two grades of oranges were involved because pursuant to federal regulations (7 CFR § 51.1091) the tolerances for condition defects are the same for both grades. That provision reads as follows:

Not more than 10 percent, by count, of the oranges in any lot may fail to meet the requirements relating to color. In addition; not more than 10 percent, by count, of the oranges in any lot may fail to meet the remaining requirements of the specified grade, but not more than one-twentieth of this amount, or one-half of 1 percent, shall be allowed for decay at shipping point: *Provided*, That an additional tolerance of 2½ percent for a total of not more than 3 percent, shall be allowed for decay en route or at destination."

The above tolerances with respect to either U.S. Fancy or U.S. No. 1 oranges are for the shipping point. With respect to decay the tolerance is specifically increased at destination. The federal inspection showed that there was only 1% decay at destination whereas the tolerance allowed as much as 3% decay. The finding of

11% damage by skin breakdown is so close to the 10% tolerance allowed that we cannot conclude that the oranges exceeded the tolerances allowed at destination. This is particularly true because there is generally some latitude given at destination with respect to the tolerances at point of origin set forth in the regulations. See *Pope Packing & Sales, Inc. v. Santa Fe Vegetable Growers Cooperative Association, Inc.*, 38 Agric. Dec. 101, 104-105 (1979); *Denice & Filice Packing Co. v. Super Food Services, Inc.*, 38 Agric. Dec. 744, 746-747 (1979).

In view of the above, we find that respondent has violated section 2 of the Act. It should be ordered to pay complainant \$1,861.00, with interest at the rate of 13% per annum.

ORDER

Within thirty days from the date of this order respondent shall pay complainant \$1,861.00 with interest thereon from February 1, 1985 at the rate of 13% per annum until paid.

Copies of this order shall be served upon the parties.

MOUNTAIN KRISP, INC., v. EMPIRE PRODUCE INC., and/or ERICH K. SCHULZ d/b/a CASCADE MARKETING CO. PACA Docket No. 2-7128. Decided April 25, 1986.

Decision by Donald A. Campbell, Judicial Officer.

ORDER REQUIRING PAYMENT OF UNDISPUTED AMOUNT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed on November 5, 1985. Complainant seeks to recover \$10,776.70, which amount is alleged to be the purchase price for apples sold to and accepted by respondent Empire Produce, Inc., in five transactions brokered by respondent Erich H. Schulz d/b/a Cascade Marketing Co., between December 26, 1984, and March 19, 1985. Respondent Schulz filed an answer to the complaint on March 12, 1986, in which he denied any liability to complaint. Respondent Empire Produce, Inc., filed an answer to the complaint on March 14, 1986. In this answer, respondent Empire admitted owing complainant \$6,505.20 of the \$10,776.70 claimed by complainant.

Section 7(a) of the Act (7 U.S.C. § 499g(a)) provides, in part:

If after the respondent has filed his answer to the complaint, it appears therein that the respondent has admit-

ted liability for a portion of the amount claimed in the complaint as damages, the Secretary . . . may issue an order directing the respondent to pay the complainant the undisputed amount . . . leaving the respondent's liability for the undisputed amount for subsequent determination.

Accordingly, under the authority of the above quoted section, respondent Empire Produce, Inc., shall pay to complainant, as an undisputed amount, \$6,505.20. Payment of this amount shall be made within 30 days from the date of this order with interest thereon at the rate of 13 percent per annum from April 1, 1985, until paid. A failure to pay this amount within 30 days will constitute a violation of section 2 of the Act, 7 U.S.C. § 499b.

Respondents' liability for payment of the disputed amount is left for subsequent determination in the same manner and under the same procedure as if no order for the payment of the undisputed amount had been issued.

Copies of this order shall be served upon the parties.

MISCELLANEOUS REPARATION DECISIONS

JIM HRONIS d/b/a JIM HRONIS & SONS v. MICHIGAN RE-PACKING & PRODUCE CO. INC. PACA Docket No. 2-6839. Decided March 7, 1986.

George S. Whitten, Presiding Officer.

Ken Youmans, Los Angeles, California, for complainant

David S. Steingold, Detroit, Michigan, for respondent

Decision by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation against respondent in the amount of \$16,494.57 in connection with a transaction involving the shipment of grapes in interstate commerce.

A copy of the formal complaint was served on respondent. Complainant, in its letter of January 21, 1986, authorized dismissal of its complaint filed herein.

Accordingly, the complaint is hereby dismissed.

Copies of this order shall be served upon the parties.

HOMESTEAD TOMATO PACKING CO. INC., v. GULF LAKE PRODUCE CO.
PACA Docket No. 2-6697. Decided March 12, 1986.

Andrew Stanton, Presiding Officer.

Pro se, for complainant and respondent

Decision by Donald A. Campbell, Judicial Officer.

ORDER DENYING PETITION FOR RECONSIDERATION

In this proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*), a Decision and Order was issued on November 7, 1985, dismissing the complaint. On December 17, 1985, complainant filed a petition for reconsideration of the Decision and Order under 7 CFR § 499g(c)).

Section 7(c) of the Act (7 U.S.C. § 499g(c)) states that any party adversely affected by the entry of a reparation order may appeal such order to a United States District Court within 30 days from the date of such order. Complainant's petition was filed 40 days after the Decision and Order was issued. Further, the petition was not even mailed to the Department until December 11, 1985, according to the postmark on the envelope, or 34 days after issuance of the Decision and Order. The Secretary, is, therefore, without jurisdiction to consider complainant's petition as an administrative agency has no jurisdiction to reconsider a decision after the decision has, in accordance with the applicable statute, become final due to the expiration of the time allowed for filing a petition for review. *Lasky v. Commissioner of Internal Revenue*, 235 F.2d 97 (9th Cir. 1956) *aff'd per curiam*, 352 U.S. 1027 (1956); *Southland Produce Co., a/t/a Keystone Produce Co. v. Caamano Brothers Wholesale*, 39 Agric. Dec. 789 (1980).

Complainant's petition for reconsideration is denied.

Copies of this order shall be served upon the parties.

**SUNSPROUTS OF TEXAS INC., v. JIM SCHAEGLER d/b/a MISSION CITY
PRODUCE & BROKERAGE Co. PACA Docket No. 2-6823. Decided
March 19, 1986.**

George S. Whitten, Presiding Officer.

Mark D. Wilson, Houston, Texas, for complainant.

Pro se, for respondent

Decision by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL

In this reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*), the parties have reached a settlement of their dispute and complainant has requested that its complaint be dismissed with prejudice. Accordingly, the complaint is hereby dismissed with prejudice. Copies of this order shall be served upon the parties.

**HOMESTEAD TOMATO PACKING CO. INC., v. R.C. McENTIRE, JR., d/b/
a R.C. McENTIRE & COMPANY. PACA Docket No. 2-7034. Decided
March 19, 1986.**

Dennis Becker, Presiding Officer

Pro se, for complainant and respondent

Decision by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation against respondent in the amount of \$2,480.00 in connection with a transaction involving the shipment of tomatoes in interstate commerce.

A copy of the formal complaint was served on respondent. By letter dated February 10, 1986, complainant notified the Department that respondent tendered to complainant a check in full settlement of complainant's claim. Complainant, in its letter of February 10, 1986, authorized dismissal of its complaint filed herein.

Accordingly, the complaint is hereby dismissed.

Copies of this order shall be served upon the parties.

INTERNATIONAL A.G. INC., v. MACK C. DEMPSEY d/k
SEY Co. PACA Docket No. 2-7073. Decided March 1985

Decision by Donald A. Campbell, Judicial Officer.

CORRECTIONS TO ORDER

An order requiring payment of the undisputed amount issued in the above-captioned matter on March 12, 1985, contained several errors which are set forth below and indicated.

The first paragraph is corrected to read, "... accepted by respondent on or about January 17, 1985."

The third paragraph is corrected to read, "The amount shall be made within 30 days from the date of the order with interest thereon at the rate of 13 percent per annum beginning January 1, 1985."

The fourth paragraph is corrected to read, "Responsibility for payment of the disputed amount is left for submission in the same manner and under the same terms as no order for the payment of the undisputed amount issued."

TOP QUALITY FRUIT & PRODUCE DISTRIBUTORS, INC.
PRODUCE, INC. PACA Docket No. 2-7077. Decided March 1986.

Decision by Donald A. Campbell, Judicial Officer.

CORRECTION TO ORDER

An order requiring payment of the undisputed amount issued in the above-captioned matter on March 12, 1985, second to the last paragraph of the order issued March 12, 1985, contained an error and is hereby corrected to read, "The liability for payment of the disputed amount is left for determination in the same manner and under the same terms as if no order for the payment of the undisputed amount issued."

ANDRUS & ROBERTS PRODUCE CO., v. BERRYMAN PRODUCE, INC.
PACA Docket No. 2-7058. Decided March 27, 1986.

Dennis Becker, Presiding Officer
Pro se, for complainant and respondent.

Decision by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation against respondent in the amount of \$26,129.96 in connection with transactions involving the shipment of potatoes in interstate commerce.

A copy of the formal complaint was served on respondent. By letter dated March 3, 1986, complainant notified the Department that respondent submitted to complainant a payment agreement which had been accepted by complainant. Complainant, in its letter of March 3, 1986, authorized dismissal of its complaint filed herein.

Accordingly, the complaint is hereby dismissed.

Copies of this order shall be served upon the parties.

**GOLD COAST PACKING, INC., v. H. SCHNELL & COMPANY, INC., and/o
LLOYD MYERS CO. INC.** PACA Docket No. 2-6414. Decided April 9, 1986.

Decision by Donald A. Campbell, Judicial Officer.

ORDER UPON REHEARING

In this proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*) an order was issued December 17, 1984, awarding reparation to complainant against H. Schnell & Company, Inc. in the amount of \$3,404.00, plus interest, and against respondent Lloyd Myers Co., Inc. in the amount of \$7,522.00, plus interest. The award against respondent Lloyd Myers Co., Inc. was to reimburse complainant for the amount of a check, apparently received from A & J Produce Corp. by Lloyd Myers Co. Inc., in its capacity as the broker who negotiated the conveyance of a load of broccoli from complainant to A & J Produce. Respondent Lloyd Myers Co., Inc. petitioned that this matter be reheard (see *J. A. Wood Co. v. Manhattan*, 25 Agric. Dec. 1498 (1966)) on the ground that the order of December 17, 1984, was in error in making any award against such respondent.

On May 15, 1985, we granted rehearing of this matter for the limited purpose of receiving evidence on the question of whether A & J Produce Corp.'s check No. 9829 in the amount of \$7,787.20, made out to Lloyd Myers Co., had ever been received and negotiated by respondent Lloyd Myers Co., Inc.

Complainant filed an opening statement with exhibits attached on August 16, 1985, and on August 21, 1985, respondent Lloyd Myers Co., Inc. was given opportunity to file evidence in the form of an answering statement. Although such respondent applied for, and was granted, two extensions of time in which to submit evidence in the form of an answering statement, it failed to submit any such evidence. Both parties filed briefs.

The record as it now stands contains a copy of an invoice issued by Lloyd Myers to A & J Produce Corp. for the rail car load of broccoli in question, requesting the payment of a total of \$7,787.50, with a paid stamp over which is written the date 11/19 and the number 9829; a copy of check no. 9829 drawn by Joseph Levantino, secretary of A & J Produce Corp. on that company's account with Marine Midland Bank in Bronx, New York for the amount of \$7,787.20 to the order of Lloyd Myers Co. and dated 11/19/82; a copy of an account reconciliation from Marine Midland Bank-New York showing that check no. 9829 in the amount of \$7,787.20 was paid by that bank on 11/24/82; and a letter from Joseph Levantino under the letterhead of A & J Produce Corp. stating that check no. 9829 was issued by A & J Produce Corporation in the amount of \$7,787.20 to Lloyd Myers on November 19, 1982, in payment for a load of broccoli, and that such check was negotiated by Lloyd Myers. On the basis of all of the evidence submitted in this proceeding it is our conclusion that Lloyd Myers Co., Inc. has been paid the amount of \$7,787.20 for the load of broccoli in question which was shipped by complainant. Consequently, our order of December 17, 1984, was correct and is hereby reinstated, except that the reparation awarded therein, with interest, shall be paid within thirty days from the date of this order.

Copies of this order shall be served upon the parties.

**RENE PRODUCE DISTRIBUTORS, INC., v. A. PELLEGRINO & SON, INC.,
and MELON PRODUCE, INC. PACA Docket No. 2-6971. Decided
April 9, 1986.**

Order issued by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation against respondent in the amount of \$119,051.45 in connection with a transaction involving the shipment of mixed vegetables in interstate commerce.

A copy of the formal complaint was served on respondent. By letter dated January 22, 1986, complainant notified the Department that it wished to have the complaint dismissed. Complainant, in its letter of January 22, 1986, authorized dismissal of its complaint filed herein.

Accordingly, the complaint is hereby dismissed.

Copies of this order shall be served upon the parties.

**A&P BROKERS v. MARK WHISNANT d/b/a RAINCROW FARMS. PACA
Docket No. 2-7010. Order issued April 9, 1986.**

Pro se, for complainant.

Sana V. Jay, for respondent.

Dennis Becker, Presiding Officer

Order issued by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation against respondent in the amount of \$119,013.47 in connection with a transaction involving the shipment of cantaloupes in interstate commerce.

A copy of the formal complaint was served on respondent. By letter dated January 29, 1986, respondent notified the Department that settlement had been reached between the parties. Complainant was notified by certified mail of respondent's letter and was given an opportunity to dispute the fact that settlement had been reached. Complainant has not disputed this settlement.

Accordingly, the complaint is hereby dismissed.

Copies of this order shall be served upon the parties.

TOM LANGE COMPANY INC., *v.* METROPLEX PRODUCE COMPANY
PACA Docket No. 2-7015. Order issued April 9, 1986.

Dennis Becker, Presiding Officer
Pro se, for complainant and respondent

Order issued by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation against respondent in the amount of \$13,063.25 in connection with a transaction involving the shipment of mixed produce in interstate commerce.

A copy of the formal complaint was served on respondent. In its answer to the formal complaint, respondent admitted owing \$12,211.50 to complainant. An Order Requiring Payment of Undisputed Amount was issued on January 17, 1986, by the Judicial Officer, assessing against respondent \$12,211.50 plus interest at the rate of 13% per annum from June 1, 1985. By letter dated March 13, 1986, complainant notified the Department that it was willing to accept payment of the undisputed amount plus interest as full settlement of complainant's claim. Complainant, in its letter of March 13, 1986, authorized dismissal of its complaint with respect to the disputed amount.

Accordingly, the complaint is hereby dismissed.

Copies of this order shall be served upon the parties.

WHEN STATE FARMS, INC., and PROCACCI BROTHERS SALES CORP.,
v. JOHN LIVACCHI PRODUCE INC., and/or VALU PAK, INC. PACA
Docket No. 2-6847. Order issued April 24, 1986.

Wm. Becker, Presiding Officer.

et al. for complainant.

Mr. R. Oliveri, Newport Beach, California, for respondent.

Order issued by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainants seek reparation against respondents in the amount of \$1,970.90 in connection with transaction involving the shipment of lettuce in interstate commerce.

A copy of the formal complaint was served on respondents. By letter dated March 17, 1986, complainants notified the Department that respondents tendered to complainants a check in full settlement of complainants' claim. Complainants, in the letter of March 1, 1986, authorized dismissal of the complaint filed herein.

Accordingly, the complaint is hereby dismissed.

Copies of this order shall be served upon the parties.

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1. *L. GALLOWAY INTERNATIONAL, INC., d/b/a GALLOWAY FARMS INTERNATIONAL v. MARK WHISNANT d/b/a RAINCROW FARMS.*
PACA Docket No. 2-7009. Order issued April 24, 1986.

William Becker, Presiding Officer.

Mark S. Fever, Porterville, California, for complainant.

Sandra V. Jay, Naples, Florida, for respondent

Order issued by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation against respondent in the amount of \$175,656.00 in connection with transactions involving the shipment of mixed produce in interstate commerce.

A copy of the formal complaint was served on respondent. By letter dated February 20, 1986, respondent notified the Department that settlement had been reached between the parties. Complain-

ant was informed that respondent had reported the parties' settlement to the Department, and was notified that, in cases where such a settlement was reached, dismissal of the complaint was proper. It was given an opportunity to contest the fact that a settlement had been achieved, but failed to do so.

Accordingly, the complaint is hereby dismissed.

Copies of this order shall be served upon the parties.

REPARATION DEFAULT DECISIONS ISSUED BY
DONALD A. CAMPBELL, JUDICIAL OFFICER

RAINIER FRUIT SALES, INC. *v.* PANCHO'S PRODUCE CO. PACA Docket No. RD-86-164. Decided March 3, 1986.

Respondent was ordered to pay complainant, as reparation, \$1,450.00 plus 13 percent interest per annum from September 1, 1985, until paid.

SONORA RANCHES INC. *v.* ALEXANDER C. GUERRA and VIOLA A. GUERRA. PACA Docket No. RD-86-165. Decided March 3, 1986.

Respondent was ordered to pay complainant, as reparation, \$1,170.00 plus 13 percent interest per annum from June 1, 1985, until paid.

FRUTICO INTERNATIONAL INC. *v.* BEN VASQUEZ PRODUCE INC. PACA Docket No. RD-86-167. Decided March 3, 1986.

Respondent was ordered to pay complainant, as reparation, \$26,953.50 plus 13 percent interest per annum from June 1, 1985, until paid.

EXETER SALES INC. *v.* GUERRA BROTHERS PRODUCE. PACA Docket No. RD-86-168. Decided March 3, 1986.

Respondent was ordered to pay complainant, as reparation, \$4,250.00 plus 13 percent interest per annum from May 1, 1985, until paid.

SCHNELL & COMPANY INC. v. MEDINA FRUITS & VEGETABLES INC.
PACA Docket No. RD-86-169. Decided March 3, 1986.

Respondent was ordered to pay complainant, as reparation, \$640.00 plus 13 percent interest per annum from July 1, 1985, until paid.

& D INTERNATIONAL INC. v. SUN FRUIT INC. PACA Docket No. RD-86-170. Decided March 5, 1986.

Respondent was ordered to pay complainant, as reparation, \$3,884.00 plus 13 percent interest per annum from March 1, 1985, until paid.

ARKANSAS VALLEY PRODUCE OF TEXAS INC. v. V & A PRODUCE.
PACA Docket No. RD-86-171. Decided March 5, 1986.

Respondent was ordered to pay complainant, as reparation, \$1,395.00 plus 13 percent interest per annum from June 1, 1985, until paid.

DOVEX IMPORTS INC. a/t/a UNIFRUTTI OF AMERICA v. J.D.C. ENTERPRISES INC. d/b/a ROGERS PRODUCE COMPANY. PACA Docket No. RD-86-172. Decided March 5, 1986.

Respondent was ordered to pay complainant, as reparation, \$13,862.00 plus 13 percent interest per annum from March 1, 1985, until paid.

TAMPICO PRODUCE INC. v. THE PRODUCE CO. PACA Docket No. RD-86-173. Decided March 5, 1986.

Respondent was ordered to pay complainant, as reparation, \$14,957.68 plus 13 percent interest per annum from June 1, 1985, until paid.

PETER SOLOMON & JOSEPH R. SOLOMON, d/b/a CATTLE VALLEY FARMS *v.* FRANCIS L. OLSON d/b/a COEXPORT WEST and/or COEXPORT INTERNATIONAL, INC. PACA Docket No. 2-6651. Decided March 14, 1986.

Respondent was ordered to pay complainant, as reparation, \$152,055.33 plus 13 percent interest per annum from August 1, 1982, until paid.

SUNNYBOY PRODUCE CO. INC. *v.* PETER M. TROMBETTO d/b/a J & M PRODUCE. PACA Docket No. RD-86-62. Decided March 19, 1986.

Respondent was ordered to pay complainant, as reparation, \$21,302.88 plus 13 percent interest per annum from January 1, 1985, until paid.

D. LOI & SON INC. *v.* QUALITY FRUIT CO. INC. PACA Docket No. RD-86-175. Decided March 31, 1986.

Respondent was ordered to pay complainant, as reparation, \$4,696.00 plus 13 percent interest per annum from February 1, 1985, until paid.

SUNSPROUTS OF TEXAS INC. *v.* CHINO'S PRODUCE INC. PACA Docket No. RD-86-176. Decided March 31, 1986.

Respondent was ordered to pay complainant, as reparation, \$26,229.40 plus 13 percent interest per annum from January 1, 1985, until paid.

B. R. DIVIN PRODUCE CO. *v.* FARMER'S SALES OF TEXAS INC. PACA Docket No. RD-86-177. Decided March 31, 1986.

Respondent was ordered to pay complainant, as reparation \$8,283.00 plus 13 percent interest per annum from March 1, 1985, until paid.

CALIFORNIA COASTAL FARMS INC. v. CROWN PRODUCE CO. a/t/a CROWN PRODUCE DIST. PACA Docket No. RD-86-178. Decided March 31, 1986.

Respondent was ordered to pay complainant, as reparation, \$4,581.00 plus 13 percent interest per annum from June 1, 1985, until paid.

UNKIST GROWERS INC. v. CROWN PRODUCE CO. a/t/a CROWN PRODUCE DIST. PACA Docket No. RD-86-179. Decided March 31, 1986.

Respondent was ordered to pay complainant, as reparation, \$18,321.95 plus 13 percent interest per annum from June 1, 1985, until paid.

JACK MALL POTATO CO. INC. v. FARMER SMITH'S WHOLESALE INC. PACA Docket No. RD-86-180. Decided April 2, 1986.

Respondent was ordered to pay complainant, as reparation, \$18,337.05 plus 13 percent interest per annum from September 1, 1985, until paid.

GREG ORCHARDS & PRODUCE INC. v. FARMER SMITH'S WHOLESALE INC. PACA Docket No. RD-86-181. Decided April 2, 1986.

Respondent was ordered to pay complainant, as reparation, \$2,375.00 plus 13 percent interest per annum from September 1, 1985, until paid.

SARGENT PRODUCE COMPANY v. V & A PRODUCE. PACA Docket No. RD-86-182. Decided April 2, 1986.

Respondent was ordered to pay complainant, as reparation, \$3,590.00 plus 13 percent interest per annum from June 1, 1985, until paid.

HOMESTEAD TOMATO PACKING CO. INC. *v.* BUSBEE TOMATO COMPANY INC. PACA Docket No. RD-86-183. Decided April 2, 1986.

Respondent was ordered to pay complainant, as reparation, \$3,168.00 plus 13 percent interest per annum from May 1, 1985, until paid.

STRUBE CELERY & VEGETABLE CO. *v.* DAVID FREED d/b/a FREED PRODUCE CO. PACA Docket No. RD-86-184. Decided April 2, 1986.

Respondent was ordered to pay complainant, as reparation, \$5,242.55 plus 13 percent interest per annum from July 1, 1985, until paid.

HOMESTEAD TOMATO PACKING CO. INC. *v.* J. V. CAMPISI INC. PACA Docket No. RD-86-185. Decided April 4, 1986.

Respondent was ordered to pay complainant, as reparation, \$6,400.00 plus 13 percent interest per annum from February 1, 1985, until paid.

FAR SOUTH INC. a/t/a B & R FARMS *v.* GIOVINAZZI PRODUCE CO. INC. PACA Docket No. RD-86-186. Decided April 4, 1986.

Respondent was ordered to pay complainant, as reparation, \$29,275.00 plus 13 percent interest per annum from December 1, 1985, until paid.

BLUE GOOSE GROWERS INC. a/t/a DOLE CITRUS *v.* BEACON PRODUCE Co. PACA Docket No. RD-86-187. Decided April 4, 1986.

Respondent was ordered to pay complainant, as reparation, \$7,750.00 plus 13 percent interest per annum from August 1, 1985, until paid.

DOLLAR & GREENE PRODUCE CO. INC. v. TERRY CROWDER d/b/a E. I. FOOD SERVICE. PACA Docket No. RD-86-188. Decided April 4, 1986.

Respondent was ordered to pay complainant, as reparation, \$760.00 plus 13 percent interest per annum from August 1, 1985, until paid.

STANDARD FRUIT AND STEAMSHIP COMPANY v. SUN VALLEY PRODUCE CO. PACA Docket No. RD-86-189. Decided April 4, 1986.

Respondent was ordered to pay complainant, as reparation, \$3,880.00 plus 13 percent interest per annum from October 1, 1985, until paid.

PARAS INC. v. KIS KISOLE d/b/a SAMCHULLI FOOD CO. PACA Docket No. RD-86-190. Decided April 7, 1986.

Respondent was ordered to pay complainant, as reparation, \$2,756.95 plus 13 percent interest per annum from April 1, 1985, until paid.

C. H. ROBINSON COMPANY v. ED SCHWARTZ d/b/a Ed's FARMERS MARKET. PACA Docket No. RD-86-192. Decided April 7, 1986.

Respondent was ordered to pay complainant, as reparation, \$9,351.00 plus 13 percent interest per annum from August 1, 1984, until paid.

SOURCE PRODUCE DISTRIBUTING CO. v. CHINO'S PRODUCE INC. PACA Docket No. RD-86-193. Decided April 7, 1986.

Respondent was ordered to pay complainant, as reparation, \$1,278.00 plus 13 percent interest per annum from June 1, 1985, until paid.

BATTAGLIA PRODUCE SALES INC. *v.* JOE PINTO & SON. PACA Docket No. RD-86-194. Decided April 16, 1986.

Respondent was ordered to pay complainant, as reparation, \$9,875.52 plus 13 percent interest per annum from April 1, 1985, until paid.

SANTA CLARA PRODUCE INC. *v.* GINO PINTO INC. PACA Docket No. RD-86-195. Decided April 16, 1986.

Respondent was ordered to pay complainant, as reparation, \$1,547.45 plus 13 percent interest per annum from January 1, 1985, until paid.

MONTEREY BAY PACKING CO. *v.* AKAHOSHI DISTRIBUTING INC. PACA Docket No. RD-86-196. Decided April 16, 1986.

Respondent was ordered to pay complainant, as reparation, \$9,720.35 plus 13 percent interest per annum from September 1, 1985, until paid.

J. R. NORTON COMPANY *v.* AKAHOSHI DISTRIBUTING INC. PACA Docket No. RD-86-197. Decided April 16, 1986.

Respondent was ordered to pay complainant, as reparation, \$6,773.25 plus 13 percent interest per annum from September 1, 1985, until paid.

J-B DISTRIBUTING CO. *v.* AKAHOSHI DISTRIBUTING INC. PACA Docket No. RD-86-198. Decided April 16, 1986.

REPARATION DEFAULT DECISIONS

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Respondent was ordered to pay complainant, as reparation, \$2,686.80 plus 13 percent interest per annum from September 1, 1985, until paid.

FRANADA MARKETING INC. a/t/a RICHARD A. GLASS CO. v. AKAHOSHI DISTRIBUTING INC. PACA Docket No. RD-86-199. Decided April 17, 1986.

Respondent was ordered to pay complainant, as reparation, \$3,695.35 plus 13 percent interest per annum from August 1, 1985, until paid.

W & H PRODUCE SALES INC. v. AKAHOSHI DISTRIBUTING INC. PACA Docket No. RD-86-200. Decided April 17, 1986.

Respondent was ordered to pay complainant, as reparation, \$722.15 plus 13 percent interest per annum from August 1, 1985, until paid.

PRIMO-OCEANO VEGETABLE EXCHANGE v. WAYNE M. HATANAKA d/b/ HATANAKA PRODUCE. PACA Docket No. RD-86-203. Decided April 17, 1986.

Respondent was ordered to pay complainant, as reparation, \$7,335.00 plus 13 percent interest per annum from July 1, 1985, until paid.

CASILLAS BROS, INC. v. WAYNE M. HATANAKA d/b/a HATANAKA PRODUCE. PACA Docket No. RD-86-204. Decided April 17, 1986.

Respondent was ordered to pay complainant, as reparation, \$2,740.60 plus 13 percent interest per annum from September 1, 1985, until paid.

PHELAN & TAYLOR PRODUCE COMPANY v. WAYNE M. HATANAKA d/b/a HATANAKA PRODUCE. PACA Docket No. RD-86-205. Decided April 17, 1986.

Respondent was ordered to pay complainant, as reparation, \$23,371.65 plus 13 percent interest per annum from August 1, 1985, until paid.

SOUZA BROS. PACKING CO. v. WALLA WALLA PRODUCE COMPANY. PACA Docket No. RD-86-206. Decided April 18, 1986.

Respondent was ordered to pay complainant, as reparation, \$8,172.00 plus 13 percent interest per annum from October 1, 1985, until paid.

BONITA PACKING CO. a/t/a BETTERAVIA FARMS v. WALLA WALLA PRODUCE CO. PACA Docket No. RD-86-207. Decided April 18, 1986.

Respondent was ordered to pay complainant, as reparation, \$2,585.00 plus 13 percent interest per annum from September 1, 1985, until paid.

TRICO TRADING CO. INC. a/t/a OLYMPIC PRODUCE CO. v. CROWN PRODUCE DISTRIBUTORS. PACA Docket No. RD-86-208. Decided April 18, 1986.

Respondent was ordered to pay complainant, as reparation, \$3,696.00 plus 13 percent interest per annum from June 1, 1985, until paid.

R & J Joseph Inc. v. CROWN PRODUCE CO. PACA Docket No. RD-86-209. Decided April 18, 1986.

Respondent was ordered to pay complainant, as reparation, \$7,292.71 plus 13 percent interest per annum from June 1, 1985, until paid.

RAWLAND F. TABLETT d/b/a R. F. TABLETT FRUIT & COLD STORAGE CO. v. JORGE L. RIVAS d/b/a PANCHOS PRODUCE CO. PACA Docket No. RD-86-210. Decided April 18, 1986.

Respondent was ordered to pay complainant, as reparation, \$1,254.00 plus 13 percent interest per annum from September 1, 1985, until paid.

**INGS CANYON FRUIT SALES CORP. v. JORGE L. RIVAS d/b/a PAN-
O'S PRODUCE Co.** PACA Docket No. RD-86-211. Decided April 21,
1986.

Respondent was ordered to pay complainant, as reparation, \$342.00 plus 13 percent interest per annum from September 1, 1985, until paid.

A. WOOD CO.-VISTA INC. v. ALEXANDER C. GUERRA and VIOLA A. GUERRA d/b/a V & A PRODUCE. PACA Docket No. RD-86-212. Decided April 21, 1986.

Respondent was ordered to pay complainant, as reparation, \$719.25 plus 13 percent interest per annum from October 1, 1985, until paid.

DE PHILLIPS INC. v. ALEXANDER C. GUERRA and VIOLA A. GUERRA d/b/a V & A PRODUCE. PACA Docket No. RD-86-213. Decided April 21, 1986.

Respondent was ordered to pay complainant, as reparation, \$650.00 plus 13 percent interest per annum from August 1, 1985, until paid.

MERIT PACKING COMPANY v. ALEXANDER C. GUERRA and VIOLA A. GUERRA d/b/a V & A PRODUCE. PACA Docket No. RD-86-214. Decided April 21, 1986.

Respondent was ordered to pay complainant, as reparation, \$6,410.00 plus 13 percent interest per annum from August 1, 1985, until paid.

NICK DELIS CO. INC. *v.* ALEXANDER C. GUERRA and VIOLA A. GUERRA d/b/a V & A PRODUCE. PACA Docket No. RD-86-215. Decided April 21, 1986.

Respondent was ordered to pay complainant, as reparation, \$10,575.50 plus 13 percent interest per annum from August 1, 1985, until paid.

GRIFFIN & BRAND OF McALLEN INC. *v.* J.D.C. ENTERPRISES INC. d/b/a ROGERS PRODUCE COMPANY. PACA Docket No. RD-86-216. Decided April 22, 1986.

Respondent was ordered to pay complainant, as reparation, \$1,020.40 plus 13 percent interest per annum from March 1, 1985, until paid.

VAL-MEX FRUIT COMPANY INC. *v.* J.D.C. ENTERPRISES INC. d/b/a ROGERS PRODUCE COMPANY. PACA Docket No. RD-86-217. Decided April 22, 1986.

Respondent was ordered to pay complainant, as reparation, \$2,087.46 plus 13 percent interest per annum from March 1, 1985, until paid.

PAYETTE VALLEY FRUIT INC. *v.* J.D.C. ENTERPRISES INC. d/b/a ROGERS PRODUCE COMPANY. PACA Docket No. RD-86-218. Decided April 22, 1986.

Respondent was ordered to pay complainant, as reparation, \$1,240.00 plus 13 percent interest per annum from February 1, 1985, until paid.

MCDONNELL & BLANKFARD INC. *v.* INTERSTATE PRODUCE INC. PACA Docket No. RD-86-36. Decided April 25, 1986.

Respondent was ordered to pay complainant, as reparation, \$3,361.00 plus 13 percent interest per annum from June 1, 1985, until paid.

**ICH KIM INC. a/t/a DICHTER BROS. & GLASS CO. v. BRANTZ WHOLE-
LE FOODS INC. PACA Docket No. RD-86-220. Decided April 25,
86.**

Respondent was ordered to pay complainant, as reparation, \$919.35 plus 13 percent interest per annum from June 1, 1985, until paid.

**ADA DISTRIBUTING CO. INC. v. BLAS S. CATALANI d/b/a BLAS CATA-
VI BROKERAGE. PACA Docket No. RD-86-221. Decided April 25,
86.**

Respondent was ordered to pay complainant, as reparation, \$660.00 plus 13 percent interest per annum from November 1, 1984, until paid.

**ORTH COUNTY FRUIT SALES INC. v. PROGRESSIVE PRODUCE INT'L.
ACA Docket No. RD-86-223. Decided April 28, 1986.**

Respondent was ordered to pay complainant, as reparation, \$3,505.05 plus 13 percent interest per annum from May 1, 1985, until paid.

**GRANADA MARKETING INC. v. PREMIUM PRODUCE CORP PACA
Docket No. RD-86-224. Decided April 28, 1986.**

Respondent was ordered to pay complainant, as reparation, \$3,328.20 plus 13 percent interest per annum from December 1, 1984, until paid.

**MACK DEMPSEY CO. v. REYNA BROTHERS. PACA Docket No. RD-86-
225. Decided April 28, 1986.**

Respondent was ordered to pay complainant, as reparation, \$1,757.30 plus 13 percent interest per annum from June 1, 1985, until paid.

ROGER MAWBY Co. v. J. A. HOWELL PRODUCE. PACA Docket No. RD-86-226. Decided April 28, 1986.

Respondent was ordered to pay complainant, as reparation, \$912.50 plus 13 percent interest per annum from July 1, 1985, until paid.

JOS. CIMINO FOODS INC. v. CONTINENTAL PRODUCE INC. PACA Docket No. RD-86-227. Decided April 28, 1986.

Respondent was ordered to pay complainant, as reparation, \$17,288.00 plus 13 percent interest per annum from March 1, 1985, until paid.

P K M INC. a/t/a FANCIFUL COMPANY v. SUN FRESH PRODUCE Co. INC. PACA Docket No. RD-86-228. Decided April 29, 1986.

Respondent was ordered to pay complainant, as reparation, \$1,794.00 plus 13 percent interest per annum from March 1, 1985, until paid.

CAL-MEX DISTRIBUTORS INC. v. P. J. PRODUCE Co. PACA Docket No. RD-86-229. Decided April 29, 1986.

Respondent was ordered to pay complainant, as reparation, \$726.00 plus 13 percent interest per annum from May 1, 1985, until paid.

BURNAC PRODUCE INC. v. TERRY CROWDER d/b/a EBENEZER HYDROPONICS. PACA Docket No. RD-86-230. Decided April 29, 1986.

Respondent was ordered to pay complainant, as reparation,
16.60 plus 13 percent interest per annum from June 1, 1985,
until paid.

**BRUYN PRODUCE CO. v. FICOR MANUFACTURING COMPANY d/b/a
PRICE CARAMEL APPLES. PACA Docket No. RD-86-231. Decided
April 29, 1986.**

Respondent was ordered to pay complainant, as reparation,
74.50 plus 13 percent interest per annum from November 1,
until paid.

**J. SCHMIEDING PRODUCE CO. INC. v. H & L SALES INC. PACA
Docket No. RD-86-232. Decided April 29, 1986.**

Respondent was ordered to pay complainant, as reparation,
37.50 plus 13 percent interest per annum from April 1, 1985,
until paid.

**UNION FRUIT & VEGETABLES DISTRIBUTORS INC. v. UNION PRODUCE
DISTRIBUTORS. PACA Docket No. RD-86-233. Decided April 30,
1986.**

Respondent was ordered to pay complainant, as reparation,
258.40 plus 13 percent interest per annum from July 1, 1985,
until paid.

**OKIST GROWERS v. T & M MARKET SERVICES INC. a/t/a GET FRESH
PRODUCE CO. PACA Docket No. RD-86-234. Decided April 30, 1986.**

Respondent was ordered to pay complainant, as reparation,
2,499.00 plus 13 percent interest per annum from June 1, 1985,
until paid.

**TEXAS DISTRIBUTING CO. INC. v. BEN VASQUEZ PRODUCE INC. PACA
Docket No. RD-86-235. Decided April 30, 1986.**

Respondent was ordered to pay complainant, as reparation, \$121,980.25 plus 13 percent interest per annum from May 1, 1985, until paid.

ADMIRAL PACKING COMPANY *v.* WEINSTEIN PRODUCE SALES INC.
PACA Docket No. RD-86-236. Decided April 30, 1986.

Respondent was ordered to pay complainant, as reparation, \$4,895.00 plus 13 percent interest per annum from September 1, 1985, until paid.

CAL VALLEY CITRUS INC. *v.* CITRUS WORLD INC. PACA Docket No.
RD-86-237. Decided April 30, 1986.

Respondent was ordered to pay complainant, as reparation, \$18,695.65 plus 13 percent interest per annum from October 1, 1985, until paid.

SPADA DISTRIBUTING CO. INC. *v.* FAIR WAY PACKING INC. PACA
Docket No. RD-86-238. Decided April 30, 1986.

Respondent was ordered to pay complainant, as reparation, \$5,695.00 plus 13 percent interest per annum from September 1, 1985, until paid.

MISCELLANEOUS REPARATION DEFAULT ORDERS

FOUR STAR TOMATO, INC., *v.* REM BROKERAGE CO. INC. PACA Docket
No. RD 86-129. Decided April 10, 1986.

Decision by Donald A. Campbell, Judicial Officer.

STAY ORDER

In this reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499 *et seq.*), a Default Order was issued on February 12, 1986, awarding reparation to the complainant in the amount of \$9,862.50. By letter received March 4, 1986, respondent has moved that this matter be reopened after default.

Accordingly, the order of February 13, 1986 is hereby stayed. Complainant may have fifteen (15) days from receipt of this order to file an answer to the petition to reopen after default.

Copies of this order shall be served upon the parties. A copy of respondent's petition shall be served upon the complainant, along with this order.

H. SCHNELL & COMPANY, INC., v. MEDINA FRUITS & VEGETABLES, INC. PACA Docket No. RD-86-169. Decided April 10, 1986.

Decision by Donald A. Campbell, Judicial Officer.

STAY ORDER

In this reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499 *et seq.*), a Default Order was issued on March 3, 1986, awarding reparation to the complainant in the amount of \$8,640.00. By letter received March 12, 1986, respondent has moved that this matter be reopened after default.

Accordingly, the order of March 3, 1986 is hereby stayed. Complainant may have fifteen (15) days from receipt of this order to file an answer to the petition to reopen after default.

Copies of this order shall be served upon the parties. A copy of respondent's petition shall be served upon the complainant, along with this order.

LINDEMANN FARMS, INC., v. GREAT WESTERN FARMS, INC., a/t/a FELIX ROCCO CO. PACA Docket No. RD-86-166. Order issued March 21, 1986.

Order issued by Donald A. Campbell, Judicial Officer.

ORDER OF CONTINUANCE

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation of \$8,266.40 against respondent in connection with transactions in interstate commerce involving shipments of cantaloupes. A copy of the formal complaint was served upon respondent, and respondent has not filed an answer thereto.

Complainant, Lindemann Farms Inc., is a corporation whose address is 22759 S. Mercey Springs Road, Los Banos, California. Respondent, Great Western Farms Inc a/t/a Felix Rocco Co., is a corporation whose address is P.O. Box 1426, Providence, Rhode Island. Respondent was licensed under the Act at the time of the transactions involved herein.

Prior to the issuance of an order in this proceeding, the Department was advised that respondent had filed in the United States Bankruptcy Court, District of Massachusetts, a voluntary petition for reorganization pursuant to Chapter XI of the Bankruptcy Act (11 U.S.C. §§ 1101-1174). The Department also was advised that a discharge in the bankruptcy proceeding would be a release of the claim before the Department.

11 U.S.C. § 362 provides for an automatic stay against continuing an action involving a debt once a party has filed a petition under the Bankruptcy Code. Therefore, in accordance with 11 U.S.C. § 362, this reparation proceeding is hereby continued until the Department receives proper notification that the Chapter 11 proceeding now pending in the United States Bankruptcy Court has been closed, dismissed, or converted to straight bankruptcy, or that the debts have been discharged through confirmation of a Plan of Arrangement.

Copies hereof shall be served upon the parties.

HOMESTEAD TOMATO PACKING CO. INC., *v.* J.V. CAMPISI, INC. PACA
Docket No. RD-86-185. Decided April 23, 1986.

Decision by Donald A. Campbell, Judicial Officer.

STAY ORDER

In this reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499 *et seq.*), a Default Order was issued on April 4, 1986, awarding reparation to the complainant in the amount of \$6,400.00. By letter received April 1, 1986, but not processed until after the Default Order was issued, respondent has moved that this matter be reopened after default.

Accordingly, the order of April 4, 1986 is hereby stayed. Complainant may have fifteen (15) days from receipt of this order to file an answer to the petition to reopen.

Copies of this order shall be served upon the parties. A copy of respondent's petition shall be served upon the complainant.

THE CROSSET COMPANY INC., v. KEVIN J. RED/b/a J.M.J. PRODUCE.
PACA Docket No. RD-86-46. Order issued April 24, 1986.

Order issued by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation against respondent in the amount of \$4,825.25 in connection with a transaction involving the shipment of produce in interstate commerce.

A copy of the formal complaint was served on respondent which failed to file an answer thereto, and a default decision was issued on December 3, 1985. However, the Department was subsequently notified that respondent had filed a petition in bankruptcy. Accordingly, on January 22, 1986, the default decision was vacated, and this matter was stayed pending completion of respondent's bankruptcy. The Department has been provided with a copy of an order of discharge of respondent herein, issued by the United States Bankruptcy Court for The Southern District of Ohio, dated February 28, 1986.

Accordingly, the complaint is hereby dismissed.

Copies of this order shall be served upon the parties.

DISCIPLINARY DECISIONS

In re: NAVIERA BILBAINA. P.Q. Docket No. 103. Decided March 11, 1986.

Frona Wood, for complainant

Pro se, for respondent.

Decision by Dorothea A. Baker, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Act of February 2, 1903, as amended, (21 U.S.C. §§ 111 and 120), the Plant Quarantine Act of August 20, 1912, as amended (7 U.S.C. §§ 151-164a, 167), and the Federal Plant Pest Act, as amended (7 U.S.C. §§ 150aa-150jj) (Acts), by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service, alleging that Naviera Bilbaina, respondent, violated the Acts and regulations promulgated thereunder (7 CFR §§ 330.100-300.400 and 9 CFR § 94.5 *et seq.*). The parties have agreed that this proceeding should be terminated by entry of the Consent Decision set forth below and have agreed to the following stipulations:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, respondent specifically admits that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining allegations in the complaint, admits to the Findings of Fact set forth below, and waives:

(a) any further procedure;

(b) any requirements that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law, or discretion, as well as the reasons or bases thereof;

(c) all rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. Respondent also stipulates and agrees that the United States Department of Agriculture is the "prevailing party" in the proceeding and waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980, as amended (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by the respondent in connection with this proceeding.

FINDINGS OF FACT

1. Naviera Bilbaina, respondent, is a Spanish corporation whose agent in the United States is Allan Dean & Company, whose address is 2909 Bay to Bay Boulevard, Suite 404, Tampa, FL 33629.

2. On or about December 3, 1984, the respondent brought foreign origin garbage into Port Manatee, Florida, on its ship the M/V Deusto.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and having agreed to the provisions set forth in the following order in disposition of the proceeding, such order will be issued.

ORDER

Respondent Naviera Bilbaina is assessed a civil penalty of two hundred fifty dollars (\$250) which shall be payable to the "Treasurer of the United States" by certified check or money order, and which shall be forwarded to Fronda C. Woods, Office of the General Counsel, Room 2422-South Building, United States Department of Agriculture, Washington, D. C. 20250-1400, within thirty (30) days from the effective date of this order.

This order shall become effective on the day this order is served upon the respondent.

In re: BAY CITY TURF, INC. P.Q. Docket No. 164. Decided March 11, 1986.

Fronda Woods, for complainant

Pro se, for respondent

Decision by William J. Weber, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Federal Plant Pest Act, as amended (Act) (7 U.S.C. §§ 150aa-150jj), by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service. The complaint alleged that the respondent violated the Act and regulations promulgated thereunder (7 CFR §§ 301.81-301.81-10). The parties have agreed that this proceeding should be terminated by entry of the Consent Decision set forth below and have agreed to the following stipulations:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, the respondent specifically admits that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining allegations in the complaint, admits to the Findings of Fact set forth below, and waives:

(a) Any further procedure;

(b) Any requirements that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law, or discretion, as well as the reasons or bases thereof;

(c) All rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. Respondent also stipulates and agrees that the United States Department of Agriculture is the "prevailing party" in the proceeding and waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by the respondent in connection with this proceeding.

FINDINGS OF FACT

1. Bay City Turf, Inc., respondent, is a corporation whose address is P.O. Box 1463, Bay City, Texas 77414.

2. On or about April 16, 1985, respondent offered 1008 yards of grass sod to Gibbons Trucking Co. for shipment from Matagorda County, Texas, to California.

CONCLUSIONS

The respondent has admitted the jurisdictional facts and has agreed to the provisions set forth in the following order in disposition of this proceeding. Therefore, such order and decision will be issued.

ORDER

The respondent Bay City Turf, Inc. is assessed a civil penalty of three hundred seventy-five dollars (\$375). The respondent shall send, payable to the "Treasurer of the United States" a certified check or money order, to Fronda C. Woods, Office of the General Counsel, Room 2422, South Building, United States Department of Agriculture, Washington, D. C. 20250-1400, within thirty (30) days from the effective date of this order.

This order shall become effective on the day this order is served upon the respondent.

In re: STEVE VANCE. P.Q. Docket No. 23. Decided March 12, 1986.

Terry Medley, for complainant.

Pro se, for respondent.

Decision by William Weber, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Federal Plant Pest Act, as amended, and the Act of August 20, 1912, as amended (Acts), (7 U.S.C. §§ 150aa *et seq.* and §§ 151-164a and 167), by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service alleging that Steve Vance, respondent, violated the Acts and regulations promulgated thereunder (7 CFR § 301.52(b)). The parties have agreed that this proceeding should be terminated by entry of the Consent Decision set forth below and have agreed to the following stipulations:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, respondent specifically admits that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining allegations in the complaint, admits to the Findings of Fact set forth below, and waives:

(a) any further procedure;

(b) any requirements that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law, or discretion, as well as the reasons or bases therefor;

(c) all rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. Respondent also stipulates and agrees that the United States Department of Agriculture is the "prevailing party" in the proceeding and waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980, as amended (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by the respondent in connection with this proceeding.

FINDINGS OF FACT

1. Steve Vance, respondent, is an individual whose address is Rt. 3, Box 373, Texarkana, Texas 75503.

2. On or about September 26, 1983, the respondent moved interstate from Texarkana, Texas, a pink bollworm generally infested area, to Garland, Arkansas, a pink bollworm suppressive area, 93 bales of seed cotton.

3. On or about October 14, 1983, the respondent moved from Texarkana, Texas, a pink bollworm generally infested Belcher, Louisiana, a pink bollworm suppressive area in seed cotton.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and having agreed to the provisions set forth in the following disposition of the proceeding, such order will be issued.

ORDER

The respondent is assessed a civil penalty of five hundred (\$250 per violation) which shall be payable to the "Treasurer, United States" by certified check or money order, and shall be forwarded to Terry L. Medley, Office of the General Counsel, Room 2422 South Building, United States Department of Agriculture, Washington, D. C. 20250-1400, within thirty (30) days of the effective date of this order.

This order shall become effective on the day upon which payment of this order is made upon respondent.

In re: TIMUR CARRIERS LIMITED. P.Q. Docket No. 141
March 13, 1986.

Kevin B. Thiemann, for complainant

Pro se, for respondent

Decision by Edward McGrail, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Act of February 24, 1903, as amended (21 U.S.C. §§ 111 and 120), the Federal Food, Drug, and Cosmetic Act, as amended (7 U.S.C. § 150aa *et seq.*), and the Act of August 30, 1912, as amended (7 U.S.C. §§ 151-164a and 167) (the "Acts"), and the complaint filed by the Administrator of the Animal and Plant Health Inspection Service alleging that Timur Carriers Limited, respondent, violated the Acts and regulations promulgated thereunder (7 CFR § 330.100 *et seq.* and 9 CFR § 94.5 *et seq.*). The respondent has agreed that this proceeding should be terminated by the Consent Decision set forth below and have agreed to the following stipulations:

1. For the purposes of this stipulation and the proceeding, this Consent Decision only, respondent specifically admits

Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining allegations in the complaint, admits to the Findings of Fact set forth below, and waives:

- (a) any further procedure;
- (b) any requirements that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law, or discretion, as well as the reasons or bases hereof;
- (c) all rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. Respondent also stipulates and agrees that the United States Department of Agriculture is the "prevailing party" in the proceeding and waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by the respondent in connection with this proceeding.

FINDINGS OF FACT

1. Timur Carriers Limited, respondent, is a company whose address is 18th Floor, Robina House, 1 Shenton Way #18-06, Singapore 0106, Republic of Singapore, and who is the owner of ship M/V TFL Democracy.

2. Timur Carriers Limited's agent for the purpose of service of process is Trans Freight Lines, Inc., 145 Route 46, Wayne, New Jersey 07470.

3. On or about May 5, 1985, the M/V TFL Democracy arrived in Jacksonville, Florida, after being at Le Havre, France, with foreign origin garbage on board.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and having agreed to the provisions set forth in the following order its disposition of the proceeding, such order and decision will be issued.

ORDER

The respondent is assessed a civil penalty of two hundred fifty U.S. dollars (\$250.00) which shall be payable to the "Treasurer of the United States" by certified check or money order, and which shall be forwarded to Kevin B. Thiemann, Office of the General Counsel, Room 2422 South Building, United States Department of Agriculture, 12th and Independence Ave., S.W., Washington, D. C.

20250-1400, within thirty (30) days from the effective date of this order.

This order shall become effective on the day upon which service of this order is made upon respondent.

In re: TRANS WORLD AIRLINES. P.Q. Docket No. 83. Decided March 14, 1986.

Mark Dopp, for complainant.

Mary McGuire, New York, N.Y., for respondent.

Decision by Victor Palmer, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Act of February 2, 1903, as amended (Act) (21 U.S.C. §§ 111 and 120) by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service alleging that the respondent violated the Act and regulations promulgated thereunder (7 CFR § 319.56 *et seq.*). The parties have agreed that this proceeding should be terminated by entry of the Consent Decision set forth below and have agreed to the following stipulations:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, respondent specifically admits that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining allegations in the complaint, admits to the Findings of Fact set forth below, and waives:

(a) Any further procedure;

(b) Any requirement that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law, or discretion, as well as the reasons or bases thereof;

(c) All rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. Respondent waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by the respondent in connection with this proceeding.

FINDINGS OF FACT

1. Trans World Airlines, respondent, is a corporation doing business at John F. Kennedy International Airport, Building 80, Jamaica, New York 11430.

2. On or about May 17, 1984, respondent was in possession of eight cartons of melons which arrived at John F. Kennedy International Airport, Jamaica, New York, on flight 803/31028 and said melons originated from Senegal.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and having agreed to the provisions set forth in the following Order in disposition of the proceeding, such Order and decision will be sued.

ORDER

The respondents is assessed a civil penalty of four hundred and fifty dollars (\$450.00). The respondent shall send, payable to the Treasurer of the United States," a certified check or money order to Clement J. McGovern, Office of the General Counsel, Room 2422, South Building, United States Department of Agriculture, Washington, D. C. 20250-1400, within thirty (30) days from the effective date of this order.

This order shall become effective on the day upon which service of this order is made upon the respondent.

In re: OSCAR R. RODRIGUEZ. P.Q. Docket No. 153. Decided March 25, 1986.

Fronda Woods, for complainant.

Pro se, for respondent

Decision by John Campbell, Administrative Law Judge.

CONSENT DECISION

On November 22, 1985, this proceeding was instituted under the Plant Quarantine Act of August 20, 1912, as amended (Act) (U.S.C. §§ 151-164a, 167), by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service. The complaint alleged that the respondent violated the Act and regulations promulgated thereunder (7 CFR § 319.56 *et seq.*). The parties have agreed that this proceeding should be terminated by entry of the

Consent Decision set forth below and have agreed to the following stipulations:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, respondent specifically admits that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining allegations in the complaint, admits to the Findings of Fact set forth below, and waives:

(a) any further procedure;

(b) any requirements that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law, or discretion, as well as the reasons or bases thereof;

(c) all rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. Respondent also stipulates and agrees that the United States Department of Agriculture is the "prevailing party" in the proceeding and waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980, as amended (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by the respondent in connection with this proceeding.

FINDINGS OF FACT

1. Oscar R. Rodriguez, respondent, is an individual whose address is Box 1431, Ruidoso Downs, New Mexico 88346.

2. On or about May 22, 1985, at El Paso, Texas, respondent imported six mangoes from Mexico into the United States.

CONCLUSIONS

The respondent has admitted the jurisdictional facts and has agreed to the provisions set forth in the following order in disposition of the proceeding. Therefore, such order will be issued.

ORDER

Respondent Oscar R. Rodriguez is assessed a civil penalty of one hundred dollars (\$100) which shall be payable to the "Treasurer of the United States" by certified check or money order, and which shall be forwarded to Fronda C. Woods, Office of the General Counsel, Room 2422-South Building, United States Department of Agriculture, Washington, D. C. 20250-1400, within thirty (30) days from the effective date of this order.

This order shall become effective on the day this order is served upon the respondent.

In re: SONIA HERNANDEZ, P.Q. Docket No. 155. Decided February 28, 1986.

Sherrie Kennedy, for complainant
Pro se, for respondent.

Decision by Victor W. Palmer, Administrative Law Judge.

DEFAULT DECISION AND ORDER

PRELIMINARY STATEMENT

This proceeding was instituted under the Plant Quarantine Act of August 20, 1912, as amended (7 U.S.C. §§ 151-164a and 167) (Act) by a complaint issued by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. The complaint was filed with the Hearing Clerk on November 22, 1985. The complaint alleged that the respondent violated sections 319.56-2(e) and 319.15(a) of the regulations (7 CFR §§ 319.56-2(e) and 319.15(a)).

Copies of the complaint and the Rules of Practice governing proceedings under the Acts were served by the Hearing Clerk, by certified mail, upon respondent on December 2, 1985. On December 27, 1985, respondent was sent, by regular mail, a notice that her answer had not been received by the Hearing Clerk in the allotted time.

Pursuant to section 1.136 of the Rules of Practice (7 CFR § 1.136) applicable to this proceeding, respondent was informed in the complaint and the letter of service that an answer should be filed with the Hearing Clerk within twenty (20) days after service of the complaint, and that failure to deny or otherwise respond to the allegations in the complaint and request an oral hearing would constitute an admission of such allegations and a waiver of such hearing. More than twenty (20) days have elapsed since respondent was served with the complaint in question. Respondent has not filed an answer to date. This Decision and Order, therefore, is issued pursuant to sections 1.136 and 1.139 of the Rules of Practice applicable to this proceeding (7 CFR §§ 1.136 and 1.139).

Accordingly, the material facts alleged in the complaint, which are admitted by respondent's failure to file an answer, are adopted and set forth herein as the findings of fact.

FINDINGS OF FACT

1. Sonia Hernandez, herein referred to as the respondent, is an individual whose address is 252 South 4th Street, Brooklyn, New York 11211.

2. On or about November 20, 1984, the respondent imported into the United States at Houston, Texas, from Mexico approximately eighteen (18) guava and two (2) pounds of apples, in violation of section 319.56-2(e) of the regulations (7 CFR § 319.56-2(e)) because the guava and apples were not imported under permit, as required.

3. On or about November 20, 1984, the respondent imported into the United States at Houston, Texas, from Mexico approximately twenty (20) nodes of sugarcane in violation of section 319.15(a) of the regulations (7 CFR § 319.15(a)) because the sugarcane was not imported under permit, as required.

CONCLUSION

By reason of the facts in the finding of fact set forth above, respondent has violated the Acts and regulations promulgated thereunder. Therefore, the following Order is issued.

ORDER

Respondent is hereby assessed a civil penalty of five hundred dollars (\$500), which shall be paid within thirty (30) days from the date this Order becomes effective. This civil penalty shall be made payable to the "Treasurer of the United States," by certified check or money order, and shall be forwarded to Sherrie Kopka Kennedy, U. S. Department of Agriculture, Office of the General Counsel, Room 2422, South Building, Washington, D. C. 20250-1400.

This Order shall have the same force and effect as if issued after full hearing and shall be final and effective thirty-five (35) days after service of this Decision and Order upon respondent, unless there is an appeal to the Judicial Officer pursuant to section 1.145 of the Rules of Practice applicable to this proceeding (7 CFR § 1.145).

[The Default Decision and Order became final on April 10, 1986.—Ed.]

*In re: ALLIED AVIATION SERVICES INTERNATIONAL CORP. P.Q. Docket
No. 162. Decided April 11, 1986.*

Kris Ikejiri, for complainant.

John Scagnelli, New York, N.Y., for respondent.

Decision by Victor W. Palmer, Administrative Law Judge.

CONSENT DECISION AND ORDER

This proceeding was instituted under the Act of February 2, 1983, as amended (21 U.S.C. § 111 and § 120), the Federal Plant Pest Act, as amended (7 U.S.C. § 150aa *et seq.*), and the Act of August 20, 1912, as amended (7 U.S.C. § 161 and 162) (Acts), by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service alleging that Allied Aviation Services International Corp., violated the Acts and regulations promulgated thereunder (9 CFR Part 94 and 7 CFR Part 330). Respondent Allied Aviation Services International Corp. and the complainant have agreed that his proceeding should be terminated by entry of the Consent Decision set forth and have agreed to the following stipulations:

1. For the purposes of this stipulation and the provision of this Consent Decision only, respondent Allied Aviation Services International Corp. admits specifically that the Secretary of the United States Department of Agriculture has jurisdiction in this matter. Respondent admits to the Findings of Fact set forth below, and waives:

(a) Any further procedure;

(b) Any requirement that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law, or discretion, as well as the reasons or bases thereof; and

(c) All rights to seek judicial review and other challenges or contest the validity of this decision.

2. Respondent Allied Aviation Services International Corp. also waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by it in connection with this proceeding.

FINDINGS OF FACT

1. On or about June 6, 1985, the respondent violated sections 94.5(b)(1) and 330.400(b)(1) of the regulations (9 CFR § 94.5(b)(1) and 7 CFR § 330.400(b)(1)) because the respondent failed to unload foreign-origin garbage from Spain and Britain at the British Airways Terminal at John F. Kennedy International Airport, in tight, leak-proof receptacles, as required.

2. On or about September 5, 1985, the respondent violated sections 94.5(b)(1) and 330.400(b)(1) of the regulations (9 CFR 94.5(b)(1) and 7 CFR 330.400(b)(1)) because the respondent failed to unload foreign-origin garbage from a British West Indies airways flight at John F. Kennedy International Airport, in tight, leak-proof receptacles, as required.

CONCLUSIONS

Respondent, having admitted the jurisdictional facts and having agreed to the provisions set forth in the following Order in disposition of this proceeding, such Order and Decision will be issued.

ORDER

Respondent Allied Aviation Services International Corp. is assessed a civil penalty of two thousand five hundred dollars (\$2,500.00) which shall be payable to "The Treasurer of the United States" by certified check or money order and which shall be paid on or before April 4, 1986 and sent to the following addresses.

Kris H. Ikejiri
Office of the General Counsel
Room 2422 South Building
U.S. Department of Agriculture
Washington, D.C. 20250-1400

Provided, however, the five hundred dollars (\$500.00) shall not be due and will be held in abeyance for so long as,

1. By June 1, 1986, respondent has all of its employees at John F. Kennedy International Airport, Jamaica, New York, who handle foreign arrival flight materials attend a training program which shall be at least one (1) hour in duration.

2. A representative of the Animal and Plant Health Inspection Service, U.S. Department of Agriculture, shall approve the content and method of the testing program prior to it being given and shall be informed of the schedule of training in order to monitor the classes as deemed necessary.

3. The training program shall include, but not be limited to, the following:

- (a) An explanation of the appropriate regulations.
- (b) A definition of what "garbage" is in the appropriate regulations.
- (c) Include any available film, slides, or other training aids in foreign animal and plant diseases and pests.

(d) Specifically outline by illustration or pictures, proper foreign garbage handling procedures, step-by-step from the initial removal of garbage from an aircraft to proper disposal.

(e) The training program shall be presented in English and other languages, as appropriate.

And Provided Further, that if it is determined after an opportunity for hearing, as provided in the Rules of Practice (7 CFR § 131.1 *et seq.*), that any term of the above provision has not been, or is not being, complied with, the civil penalty held in abeyance shall be withdrawn and the \$500.00 shall be due immediately.

And Provided Further, this Consent Decision and Order shall not abrogate or supersede "Compliance Agreement" number 16, signed on September 26, 1984 by the respondent and the complainant.

This Consent Decision and Order shall become effective on the day of service upon the respondent.

In re: AMALIA MENDEZ deLEON. P.Q. Docket No. 137. Decided February 25, 1986.

Sherry Kennedy, for complainant

Pro se, for respondent.

Decision by John A. Campbell, Administrative Law Judge.

DEFAULT DECISION AND ORDER

PRELIMINARY STATEMENT

This proceeding was instituted under the Plant Quarantine Act of August 20, 1912, as amended (Act) (7 U.S.C. §§ 151-164a and 167) by a complaint issued by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. The complaint was filed with the Hearing Clerk on October 16, 1985. The complaint alleged that the respondent violated sections 319.27(a) and 319.27-3 of the regulations (7 CFR 319.2' and 319.27-3).

Copies of the complaint and the Rules of Practice governing proceedings under the Act were served by the Hearing Clerk, by first class mail, upon respondent on October 26, 1985. On November 1, 1985, respondent was sent, by regular mail, a notice that an answer had not been received by the Hearing Clerk in the allotted time.

Pursuant to section 1.136 of the Rules of Practice (7 CFR § 1.136) applicable to this proceeding, respondent was informed in the complaint and the letter of service that an answer should be filed w

the Hearing Clerk within twenty (20) days after service of the complaint, and that failure to deny or otherwise respond to the allegations in the complaint and request an oral hearing would constitute an admission of such allegations and a waiver of such hearing. More than twenty (20) days have elapsed since respondent was served with the complaint in question. Respondent has not filed an answer to date. This Decision and Order, therefore, is issued pursuant to sections 1.136 and 1.139 of the Rules of Practice applicable to this proceeding (7 CFR §§ 1.136 and 1.139).

Accordingly, the material facts alleged in the complaint, which are admitted by respondent's failure to file an answer, are adopted and set forth herein as the findings of fact.

FINDINGS OF FACT

1. Amalia Mendez deLeon, herein referred to as the respondent, is an individual whose address is 2109 E. San Antonio Avenue, #217, El Paso, Texas 79901.

2. On or about July 30, 1984, the respondent imported into the United States at El Paso, Texas, from Mexico, approximately one (1) pound of Mexican limes, which are prohibited articles, in violation of sections 319.27(a) and 319.27-3 of the regulations (7 CFR §§ 319.27(a) and 319.27-3) which prohibit such importation.

CONCLUSIONS

By reason of the facts in the findings of fact set forth above, respondent has violated the Act and regulations promulgated thereunder. Therefore, the following Order is issued.

ORDER

Respondent is hereby assessed a civil penalty of two hundred fifty dollars (\$250), which shall be paid within thirty (30) days from the date this Order becomes effective. This civil penalty shall be made payable to the "Treasurer of the United States," by certified check or money order, and shall be forwarded to Sherrie Kopka Kennedy, U. S. Department of Agriculture, Office of the General Counsel, Room 2422, South Building, Washington, D. C. 20250-1400.

It shall have the same force and effect as if issued after

It shall be final and effective thirty-five (35) days after the date of this Decision and Order upon respondent, unless

It shall be subject to review by the Administrative Law Judge or the Hearing Officer pursuant to section 1.145

It shall be applicable to this proceeding (7 CFR

[The Default Decision and Order became final on April 14, 1986.—Ed.]

In re: ALLIED AVIATION SERVICE INTERNATIONAL CORPORATION. P.Q.
Docket No. 147. Decided April 21, 1986.

Fronza Woods, for complainant.

Pro se, for respondent.

Decision by William Weber, Administrative Law Judge.

CONSENT DECISION

On November 7, 1985, this proceeding was instituted under the Act of August 20, 1912, as amended (7 U.S.C. §§ 151-164a and 167) (Act), by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service. The complaint alleged that the respondent violated the Act and regulations promulgated thereunder (7 CFR § 319.56 *et seq.*). The parties have agreed that this proceeding should be terminated by entry of the Consent Decision set forth below. The parties have agreed to the following stipulations:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, respondent specifically admits that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining allegations in the complaint, admits to the Findings of Fact set forth below, and waives:

(a) any further procedure;

(b) any requirements that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law, or discretion, as well as the reasons or bases thereof;

(c) all rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. Respondent also stipulates and agrees that the United States Department of Agriculture is the "prevailing party" in the proceeding and waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by the respondent in connection with this proceeding.

FINDINGS OF FACT

1. Allied Aviation Service International Corporation, respondent, is a corporation whose address is International Arrivals Building, Room 2129, JFK International Airport, Jamaica, New York 11430.

2. On or about January 24, 1985, at John F. Kennedy International Airport, the respondent, by its employee Maria Jimenez, removed two apples and one orange from El Al Israel Airlines flight number 001.

CONCLUSIONS

The respondent has admitted the jurisdictional facts and has agreed to the provisions set forth in the following order in disposition of the proceeding. Therefore, such order will be issued.

ORDER

Respondent Allied Aviation Service International Corporation is assessed a civil penalty of three hundred seventy-five dollars (\$375) which shall be payable to the "Treasurer of the United States" by certified check or money order, and which shall be forwarded to Fronda C. Woods, Office of the General Counsel, Room 2422, South Building, United States Department of Agriculture, Washington, D. C. 20250-1400, within thirty (30) days from the effective date of this order.

This order shall become effective on the day upon which service of this order is made upon respondent.

In re: MOVSOVITZ AND SONS OF FLORIDA, INC. P.Q. Docket No. 167.
Decided April 21, 1986.

Frona Woods, for complainant.

Isaac Levy, Jacksonville, Florida, for respondent.

Decision by Edward H. McGrail, Administrative Law Judge.

CONSENT DECISION

On December 23, 1985, this proceeding was instituted under the Quarantine Act of August 20, 1912, as amended (7 U.S.C. § 167), and the Federal Plant Pest Act, as amended (7 U.S.C. §§ 50aa-150jj) (Acts), by a complaint filed by the Animal and Plant Health Inspection Service. The complaint alleged that the respondent violated the Acts and regulations thereunder (7 CFR §§ 301.75-301.75-8). The parties consented that this proceeding should be terminated by

entry of the Consent Decision set forth below and have agreed to the following stipulations:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, the respondent specifically admits that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining allegations in the complaint, admits to the Findings of Fact set forth below, and waives:

(a) Any further procedure;

(b) Any requirements that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law, or discretion, as well as the reasons or bases thereof;

(c) All rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. Respondent also stipulates and agrees that the United States Department of Agriculture is the "prevailing party" in the proceeding and waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by the respondent in connection with this proceeding.

FINDINGS OF FACT

1. Movsovitiz and Sons of Florida, Inc., respondent, is a corporation whose address is 3100 Hilton Street, Jacksonville, Florida 32208.

2. On or about June 7, 1985, at Jacksonville, Florida, the respondent offered to a common carrier, for shipment to Puerto Rico, at least seven boxes of Florida grapefruit, on invoice number 85-000800.

CONCLUSIONS

The respondent has admitted the jurisdictional facts and has agreed to the provisions set forth in the following order in disposition of this proceeding. Therefore, such order and decision will be issued.

ORDER

The respondent Movsovitiz and Sons of Florida, Inc. is assessed civil penalty of three hundred seventy-five dollars (\$375). The respondent shall send, payable to the "Treasurer of the United States" a certified check or money order, to Fronda C. Woods, Office of the General Counsel, Room 2422, South Building, United States Department of Agriculture, Washington, D. C. 20250-1400, within thirty (30) days from the effective date of this order.

This order shall become effective on the day of this order is served upon the respondent.

In re: OGDEN FOOD SERVICE CORPORATION. P.Q. Docket No. 237. Decided April 28, 1986.

Joseph Pembroke, for complainant

Pro se, for respondent

Decision by Victor W. Palmer, Administrative Law Judge.

CONSENT ORDER

This proceeding was instituted under the regulations governing the handling and disposal of foreign-origin garbage (7 CFR 330.400 and 9 CFR 94.5) by a complaint filed by the Deputy Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture, alleging that the Ogden Food Service Corporation (hereinafter "respondent") at its facility located at Building 146 John F. Kennedy International Airport, Jamaica, New York, violated the regulations and its compliance agreement with the Animal and Plant Health Inspection Service. This order is entered pursuant to the consent order provisions of the procedures adopted for use in this proceeding.

In its answer to the complaint the respondent admits the jurisdictional allegations in the complaint and specifically admits that the Administrator has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of a specified order.

The complainant has recommended that the order consented to by respondent be entered in settlement of this proceeding.

FINDINGS OF FACT

Respondent is a corporation and at all times material herein was doing business under a compliance agreement with PPQ, APHIS, under foreign-origin garbage at JFK International Airport, New York. Respondent's Building #146, Kitchens A, International Airport, Jamaica, New York, was approved for the handling and disposal under the regulations (7 CFR 330.400) operating under compliance agree-

ments (Nos. 5 and 6A) with the Animal and Plant Health Inspection Service, Plant Protection and Quarantine.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and the parties having agreed to the entry of the following order in settlement of this proceeding, the order will be entered.

ORDER

1. Compliance Agreements No. 5 and 6A, pertaining to Building #146, Kitchens A & B facility, between respondent and the Animal and Plant Health Inspection Service, United States Department of Agriculture, shall be withdrawn on March 14, 1986. However, such withdrawal shall be suspended for the period from March 14, 1986 through September 8, 1986 if respondent implements the procedures set forth in paragraph 2 below. In addition, if the procedures set forth in paragraph 2 below are implemented by respondent, the aforementioned compliance agreements will be automatically reinstated on September 8, 1986. Failure of respondent to act in accordance with the obligations set forth in paragraph 2 below will constitute grounds to revoke the suspension of the aforementioned withdrawal of Compliance Agreements No. 5 and 6A, but not for a period of more than one month.

2. Respondent, as a condition to the suspension of the withdrawal of the Compliance Agreements set forth in paragraph 1 above, agrees to the following continuing obligations at Building #146:

a. Implement a training and orientation program for all of its employees who handle or dispose of foreign-origin garbage. Respondent shall assure that only such trained employees handle foreign-origin garbage. The training shall include a minimum of one year of initial instruction by a PPQ-approved instructor. In addition, such trained employees shall be provided at least one hour of review training annually. The training and orientation program shall inform such employees of the content and purpose of the regulations as well as the provisions of the Compliance Agreements to assure proper handling of foreign-origin garbage in accordance with 7 CFR § 330.400 and 9 CFR § 94.5. The aforementioned training sessions shall emphasize the consequences to U.S. agriculture if foreign-origin plant or animal pests are introduced into the United States. Respondent agrees to maintain records of employee participation in the training program.

b. Promptly notify the PPQ office at JFK International Airport of any breakdown or malfunction of any garbage processing equipment used to process foreign-origin garbage.

c. Provide for the immediate pickup and proper handling and disposal of foreign-origin garbage by another approved facility (or in another manner approved by PPQ) if any of respondent's garbage processing equipment is inoperable or overloaded or if garbage cannot be immediately disposed of.

d. Appoint a "crew supervisor" who will be responsible for all foreign-origin garbage handling operations at Building No. 146. The crew supervisor will assure that all foreign-origin garbage will be handled in accordance with 7 CFR § 330.400 and 9 CFR § 94.5.

e. Designate Mr. Bill Smith, Vice President of Sales and Services, or his successor, as a representative to whom PPQ inspectors may contact concerning any matter set forth herein. In Mr. Smith's absence, PPQ inspectors may contact Mr. Joseph Nappi.

3. The PPQ personnel assigned to JFK International Airport will make the initial determination as to whether the conditions set forth in paragraph 2 have been met by respondent. Such determination will be immediately communicated to respondent's crew supervisor at Building No. 146 and to respondent's Vice President of Sales and Services.

4. Should a dispute arise between respondent and PPQ officials at JFK International Airport regarding respondent's compliance with the provisions of paragraph 2, the dispute may be submitted by either respondent or the PPQ officials to the Assistant to the Deputy Administrator, Animal Plant Inspection Service, Room 656 Federal Building, 6506 Belcrest Road, Hyattsville, Maryland 20782. The Assistant to the Deputy Administrator will arbitrate any and all such disputes after notice and informal hearing to both parties. The decision of the Assistant to the Deputy Administrator is final.

5. Release from any particular provision of this order shall not have any effect upon any other provision of this order.

6. This order shall not be construed to prevent the institution of action to withdraw approval to process foreign-origin garbage for any other violation of the regulations or a compliance agreement not covered in this order.

7. This order shall become effective on the day upon which service of this order is made upon respondent.

In re: ALOHA AIRLINES. P.Q. Docket No. 151 and 152. Decided April 30, 1986.

Joseph Pembroke, for complainant.

David M.K. Lum, Honolulu, Hawaii, for respondent.

Decision by Victor W. Palmer, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Act of August 20, 1903, as amended (Act) (7 U.S.C. §§ 151-164a and § 167), by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service alleging that, Aloha Airlines, respondent, violated the Act and regulations promulgated thereunder (7 CFR § 818.13 *et seq.*). The parties have agreed that this proceeding should be terminated by entry of the Consent Decision set forth below and have agreed to the following stipulations:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, respondent specifically admits that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining allegations in the complaint, admits to the Findings of Fact set forth below, and waives:

- (a) any further procedure;
- (b) any requirement that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law, or discretion, as well as the reasons or bases thereof;
- (c) all rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. Respondent also stipulates and agrees that the United States Department of Agriculture is the "prevailing party" in the proceeding and waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by the respondent in connection with this proceeding.

FINDINGS OF FACT

- 1. Aloha Airlines, respondent, is a corporation whose mailing address is P. O. Box 30028, Honolulu, Hawaii 96820.
- 2. On or about April 6, May 3, and July 1, 1985, respondent moved baggage for transshipment to California.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and having agreed to the provisions set forth in the following order in disposition of this proceeding, such order will be issued.

ORDER

The respondent is assessed a civil penalty of one thousand two hundred dollars (\$1,200) which shall be payable to the "Treasurer of the United States," by certified check or money order, and which shall be forwarded to Joseph P. Pembroke, Office of the General Counsel, Room 2422, South Building, United States Department of Agriculture, Washington, D. C. 20250-1400, within thirty (30) days from the effective date of this order.

This order shall become effective on the day upon which service of this order is made upon the respondent.

MISCELLANEOUS DISCIPLINARY DECISIONS

In re: GREGORIO A. MIRANDA. P.Q. Docket No. 104. Decided March 25, 1986.

Decision by John A. Campbell, Administrative Law Judge.

MOTION TO DISMISS COMPLAINT

For good cause shown, Complainant's Motion to Dismiss is hereby *granted*.

In re: MARIA DEPORRAS. P.Q. Docket No. 85. Decided March 28, 1986.

Clement McGovern, for complainant.

Pro se, for respondent

Decision by Edward McGrail, Administrative Law Judge.

ORDER DISMISSING COMPLAINT

By motion, filed March 24, 1986, complainant counsel requests that the complaint in this matter, filed on April 12, 1985, be dismissed on the grounds that prosecution is no longer warranted to effectuate the purposes of the program. For good cause shown:

IT IS ORDERED, that the complaint filed in this proceeding on April 12, 1985, be, and hereby is, dismissed.

In re: ROY LEON AND Co. INC. P.Q. Docket No. 70. Decided April 1, 1986.

Kris Ikejiri, for complainant
Pro se, for respondent.

Decision by Edward H. McGrail, Administrative Law Judge.

ORDER DISMISSING COMPLAINT

For good cause shown in complainant's motion, filed April 1, 1986, the complaint is dismissed.

IT IS ORDERED, that the complaint issued in this matter on March 26, 1985, be, and hereby is, dismissed.

In re: PITMAN AND SONS, INC. P.Q. Docket No. 183. Decided April 14, 1986.

Sherrie Kennedy, for complainant.
Pro se, for respondent

Decision by Edward H. McGrail, Administrative Law Judge.

ORDER DISMISSING COMPLAINT

For good cause shown in complainant's Motion to Dismiss, the complaint in this matter is dismissed.

IT IS ORDERED, that the complaint in this matter, filed February 11, 1986, be, and hereby is, dismissed.

In re: JOSE LUIS ALVAREZ. P.Q. Docket No. 159. Decided April 14, 1986.

Sherrie Kennedy, for complainant
Pro se, for respondent.

Decision by Dorothea A. Baker, Administrative Law Judge.

DISMISSAL OF COMPLAINT

Pursuant to Motion therefor, filed April 3, 1986, the Complaint filed herein on December 3, 1985, is hereby Dismissed. In accord-

ance with telephone conversation of this date with Attorney Sherrie Kennedy, the Complainant's Motion for Adoption of Proposed Decision, filed February 5, 1986, is nullified.

Copies hereof shall be served upon the parties.

In re: FRANCISCA PINO. P.Q. Docket No. 199. Decided April 21, 1986.

Frona Woods, for complainant.

Pro se, for respondent.

Decision by John A. Campbell, Chief Administrative Law Judge.

DISMISSAL WITHOUT PREJUDICE

For good cause shown, complainant's motion to dismiss the complaint without prejudice, is granted.

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